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WHY: To provide the public with access to information necessary to research Federal agency regulations which directly affect them. There will be no discussion of specific agency regulations.

WHEN: Tuesday, February 7, 2006
9:00 a.m.–Noon

WHERE: Office of the Federal Register
Conference Room, Suite 700
800 North Capitol Street, NW.
Washington, DC 20002

RESERVATIONS: (202) 741–6008

Contents

Federal Register

Vol. 71, No. 17

Thursday, January 26, 2006

Separate Parts In This Issue

Reader Aids
Consult the Reader Aids section at the end of this issue for phone numbers, online resources, finding aids, reminders, and notice of recently enacted public laws.

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CFR PARTS AFFECTED IN THIS ISSUE

A cumulative list of the parts affected this month can be found in the Reader Aids section at the end of this issue.

Rules and Regulations

Federal Register
Vol. 71, No. 17
Thursday, January 26, 2006

DEPARTMENT OF AGRICULTURE

Commodity Credit Corporation

7 CFR 1427

RIN 0560–AH29

Cottonseed Payment Program

AGENCIES: Commodity Credit Corporation, USDA.

ACTION: Final rule.

SUMMARY: This final rule codifies portions of the Military Construction Appropriations and Emergency Hurricane Supplemental Appropriations Act, 2005, enacted on October 13, 2004 Public Law 108–324 (''2004 Act'') to provide assistance to producers and first-handlers of the 2004 crop of cottonseed in counties declared a disaster by the President of the United States due to 2004 hurricanes and tropical storms. Other 2004 Act disaster provisions for other crops were implemented under separate rules.

DATES: This rule is effective January 26, 2006.

FOR FURTHER INFORMATION CONTACT: Chris Kyer, phone: (202) 720–7935; e-mail: *chris.kyer@wdc.usda.gov.*

SUPPLEMENTARY INFORMATION:

Discussion of Final Rule

In a proposed rule published in the **Federal Register** at 70 FR 36536 (June 24, 2005), the Commodity Credit Corporation (CCC) proposed regulations for administering the 2004 Cottonseed Payment Program authorized by Division B, Section 104 of the 2004 Act (Pub. L. 108–324). The 2004 Act requires CCC to provide assistance to producers and first-handlers (cotton gins) of the 2004 crop of cottonseed in counties declared a disaster by the President of the United States due to hurricanes and appropriated $10 million for these payments. As amended, by Section 789 of Division A of the Consolidated Appropriations Act, 2005 (Pub. L. 108–447), Section 104 provides:

> The Secretary of Agriculture shall use $10,000,000 to provide assistance to producers and first handlers of the 2004 crop of cottonseed located in counties declared a disaster by the President of the United States in 2004 due to hurricanes or tropical storms.

The proposed rule described how the program was last administered for the 2002 crop year and how the 2004 program will be operated differently from the 2002 program. To summarize, the 2002 program used 2002 crop year production as a basis for payment because all gins in the nation were eligible and the intent of the program was to offset the effect on producers of low cottonseed prices. However, because the 2004 program is tied to legislation that involves hurricanes and tropical storms, the agency's intent with the 2004 Cottonseed Payment Program was to base payments on a loss of cotton lint (to be converted to a cottonseed equivalent), not actual lint production. Therefore, the rule proposed that the applicant's quantity for payment will be calculated by a gin by comparing each of their eligible producer's 2003 lint production to their 2004 lint production and adjusting the difference to reflect changes in planted acreages between the two years. The gin would then add up their producer's losses to arrive at a total quantity for which to request payment. The rule also provided for situations where the cotton producer did not produce 2003 cotton or when the producer may have delivered 2004 cotton to a different gin than for 2003. Other key provisions of the rule provided regulations for eligible cottonseed, eligible applicants, available funds, agency calculation of the total payment quantity, determining the payment rate, and liability of first handler.

Comments and Changes to Final Rule

The 30-day comment period for the proposed rule closed on July 25, 2005. FSA received comments from 28 entities or persons which included 4 cotton associations, 2 gins, 10 United States Senators, and 10 Congressmen. In general, the respondents consistently expressed concerns about how the proposed rule will place administrative burden on gins, particularly at a time when cotton is being harvested and ginned, and recommended that USDA identify a more efficient and less burdensome way to deliver the program. However, two cotton associations conceded that while the proposed rule is much more complicated than previous cottonseed assistance programs and puts a much heavier administrative burden on cotton ginners, it does seem to be the most equitable way to distribute assistance to producers who suffered production losses.

Specifically, the letters from 10 Senators and Congressmen cited the additional administrative burden placed upon gins by the proposed rule but did not offer alternative recommendations. One ginner expressed concern about the administrative burden, plus the potential for conflict created by the proposed rule between the gin and the producer where the gin cannot control the outcome of the rules but is blamed for the results nonetheless. Another ginner specifically recommended a distribution of assistance based on 2003 crop year lint production which would be more equitable and less burdensome to producers and ginners. Two associations stated that cotton ginners are willing to gather data from producers but suggested an extended application time of 45 to 60 days. These two associations also suggested use of a standard form that producers can use to provide production and acreage data to their gins that also provides a certification by producers that they are responsible for the accuracy of the data on the form. Two additional associations submitted similar recommendations and suggested the use of a form by producers with a self-certification clause that would shift liability from gins to producers, an application period of at least 45 days, clarification of provisions regarding producers who did not plant cotton in either 2003 or 2004, and the use of a lint-to-cottonseed conversion factor based on the national average as in past programs. Further, these associations requested that all gins in states with eligible disaster counties receive disaster application information and the eligible county list.

More specific comments are discussed below section by section, along with minor changes that will be made in the final rule.

Section 1427.1100 Applicability

Three cotton associations suggested that gins in states with disaster-declared counties should receive application information and an eligible county list in order to account for all eligible production. While there was no recommendation as to how to carry out the suggestion, CCC agrees that program information must be easily available and will, therefore, make the instructions, forms and list of eligible counties available to gins electronically on the internet or by electronic mail. This provision will be handled administratively. Therefore, the section is adopted as proposed.

Section 1427.1105 Payment Application and Deadline

Four associations stated that in order to administer the program as USDA proposes they will need additional time to gather data from producers, perform necessary calculations and prepare applications to CCC. One association suggested an application deadline of 45 to 60 days, and three associations suggested at least 45 days. CCC agrees that additional time may be necessary for gins to gather data from producers that are not currently on file, to compile such data, and prepare an application. Thus, the final rule provides that gins have 60 calendar days from the date the program is announced in the **Federal Register** to file applications with CCC.

Section 1427.1107 Applicant Payment Quantity

All of the respondents cited the additional burden the proposed rule would place on gins as compared to previous Cottonseed Payment Programs. Specifically, the proposed rule provided that gins must differentiate production from producers located in eligible and non-eligible counties, gather data from producers or other gins if a producer ginned cotton at a different gin in 2003, calculate expected production for new producers who did not produce cotton in 2003, and calculate lint production losses for each producer based on 2003 and 2004 production, adjusting such losses for differences in acreage between the two years. This required gins to gather from producers data not already on file such as planted acreages and data for producers new to the gin. CCC recognizes that, compared to past programs, gins will be required to perform additional work and thoroughly explored other options to ease the burden, such as simply using 2003 production as a basis for payment or comparing 2003 production to 2004 production without considering the difference in acreages between the two years. After consideration, both options were determined to be fiscally irresponsible ways to operate a disaster-related program. Therefore, the section will be adopted as proposed. However, CCC will make every effort to assist gins in obtaining the data necessary that they do not currently have on file and will provide additional time for the gins to gather data and to prepare applications for submission to CCC.

Section 1427.1108 Total Payment Quantity

Two associations recommended that the eligible quantity of cottonseed for payment be determined using a conversion factor based on the national average and cited the national average seed-to-lint ratio as used for past programs. CCC did propose a different formula for computing the seed-to-lint ratio from what was done in the past, except for using the five years preceding 2004. Thus, CCC adopts § 1427.1108(b) as proposed.

Section 1427.1111 Liability of First Handler

Two cotton associations cited the need for a shift in data liability from the gin to the producer when additional data must be gathered by the gin that the gin does not already have, such as acreage data. It was suggested that data be provided by producers on a form containing a self-certification clause that would shift liability and also provide documentation if an audit is necessary or if a dispute arises. CCC disagrees that liability should be shifted to the producer because the gin is the applicant and recipient of program benefits. Therefore this section is adopted as proposed.

Executive Order 12866

This rule has been determined to be ''Not Significant'' under Executive Order 12866 and has not been reviewed by the Office of Management and Budget (OMB).

Regulatory Flexibility Act

The Regulatory Flexibility Act does not apply to this rule because CCC is not required by 5 U.S.C. 553 or any other law to publish a notice of proposed rulemaking with respect to the subject of this rule.

Environmental Assessment

The environmental impacts of this rule have been considered consistent with the provisions of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, the regulations of the Council on Environmental Quality (40 CFR Parts 1500–1508), and FSA's regulations for compliance with NEPA, 7 CFR part 799. To the extent these authorities may apply, CCC has concluded that this rule is categorically excluded from further environmental review as evidenced by the completion of an environmental evaluation. No extraordinary circumstances or other unforeseeable factors exist which would require preparation of an environmental assessment or environmental impact statement. A copy of the environmental evaluation is available for inspection and review upon request.

Executive Order 12988

The rule has been reviewed in accordance with Executive Order 12988. This proposed rule preempts State laws to the extent such laws are inconsistent with it. This rule is not retroactive. Before judicial action may be brought concerning this rule, all administrative remedies set forth at 7 CFR Parts 11 and 780 must be exhausted.

Executive Order 12372

This program is not subject to Executive Order 12372, which requires intergovernmental consultation with State and local officials. See the notice related to 7 CFR part 3015, subpart V, published at 48 FR 29115 (June 24, 1983).

Unfunded Mandates

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) does not apply to this rule because CCC is not required by 5 U.S.C. 553 or any other law to publish a notice of proposed rulemaking for the subject of this rule. Further, this rule contains no unfunded mandates as defined in sections 202 and 205 of UMRA.

Paperwork Reduction Act of 1995

A request for comments on the information collection needed for this program was part of the proposed rule. As stated above, several respondents commented that the proposed rule is much more complicated than previous cottonseed assistance programs and puts a much heavier administrative burden on cotton ginners, and requested that this burden be reduced. CCC explored options to ease the burden but all were determined to be fiscally irresponsible. However, CCC will assist gins in obtaining the data necessary and will provide time to gather data and to prepare applications for submission. The final information collection package has been approved by OMB and assigned OMB Control Number 0560–0256.

Government Paperwork Elimination Act

CCC is committed to compliance with the Government Paperwork Elimination Act (GPEA) and the Freedom to E-File Act, which require Government agencies in general, and the FSA in particular, to provide the public the option of submitting information or transacting business electronically to the maximum extent possible. Because of the need to publish these regulations quickly, the forms and other information collection activities required to be utilized by a person subject to this rule are not yet fully implemented in a way that would allow the public to conduct business with CCC electronically. Accordingly, at this time, all forms required to be submitted under this rule may be submitted to CCC by mail or FAX.

List of Subjects in 7 CFR Part 1427

Agriculture, Cottonseed.

■ For the reasons set out in the preamble, 7 CFR 1427 is amended as set forth below.

PART 1427—COTTON

■ 1. The authority citation for 7 CFR part 1427 is revised to read as follows:

Authority: 7 U.S.C. 7231–7239; 15 U.S.C. 714b, 714c; Pub. L. 108–324, Pub. L. 108–447.

■ 2. Revise the heading to subpart F to read as follows:

Subpart F—2004 Cottonseed Payment Program

■ 3. Revise § 1427.1100 to read as follows:

§ 1427.1100 Applicability.

(a) Subject to the availability of funds, this subpart sets forth the terms and conditions under which the Commodity Credit Corporation (CCC) will provide payments under the cottonseed payment program for the 2004 crop year of cottonseed. Additional terms and conditions may be set forth in the application or other forms which must be executed to participate in the cottonseed payment program.

(b) Payments shall be available only as provided in this subpart and only with respect to cottonseed in counties declared a disaster by the President of the United States due to hurricanes or tropical storms.

§ 1427.1102 [Amended]

■ 4. In § 1427.1102 remove the definitions ''Number of ginned cotton bales'' and ''Running bale.''

■ 5. Revise § 1427.1103 to read as follows:

§ 1427.1103 Eligible cottonseed and counties.

To be eligible for payments under this subpart:

(a) Counties must have been declared a disaster by the President of the United States due to 2004 hurricanes or tropical storms.

(b) Cotton must not have been destroyed or damaged by fire, flood, or other events such that its loss or damage was compensated by other local, State, or Federal government or private or public insurance or disaster relief payments.

■ 6. Amend § 1427.1104 by revising the section heading, revising paragraph (a) and in paragraph (c) by removing the term ''low cottonseed prices'' and adding ''the loss of cottonseed,'' in its place to read as follows:

§ 1427.1104 Eligible applicants (first handlers).

(a) An eligible first handler of cottonseed shall be a gin that has an eligible payment quantity as determined under § 1427.1107. Only an eligible first handler of cottonseed shall be eligible to file an application for payment under this subpart.

* * * * *

■ 7. Amend § 1427.1105 by revising the section heading and paragraph (b) to read as follows:

§ 1427.1105 Payment application and deadline.

* * * * *

(b) The application deadline shall be 60 calendar days after the rules in this subpart become effective unless otherwise announced by CCC. Applications received after such application deadline will not be accepted for payment.

* * * * *

■ 8. Revise § 1427.1106 to read as follows:

§ 1427.1106 Available funds.

The total available program funds for the 2004-crop cottonseed program provided for in this subpart shall be $10 million.

■ 9. Revise § 1427.1107 to read as follows:

§ 1427.1107 Applicant payment quantity.

(a) The applicant's payment quantity of cottonseed will be calculated by the applicant and submitted on the Cottonseed Payment Application and Certification for approval for by CCC. An applicant must be an eligible gin and the applicant's payment eligibility will be based on the determination of the amount of lint deliveries by cotton producers in eligible counties which were lost to the gin because of the qualifying hurricane or tropical storm as calculated under this section.

(1) The lost lint determination will be made on a producer-by-producer and farm-by-farm basis, based on producer certification, ginning records and other relevant information as applicable.

(2) The loss determination will be limited to losses related to 2004-crop cotton production in eligible counties. A cotton producer's gross loss of lint shall be determined based on a comparison of lint deliveries for 2003 and 2004 by the producer from the eligible farm to all gins. That difference will be adjusted to reflect changes in the acreage planted in the two years by the producer on the eligible farm and adjusted for losses due to reasons other than hurricane or tropical storm.

(b) The producer will certify the gin or gins to which the lost lint production as so determined would have been delivered. Also, the producer will certify the relevant percentages of the losses that would have been delivered to each gin if more than one gin would have received the deliveries. Apportionment of the loss may be made by CCC between gins on that basis.

(c) If the producer delivered 2004-crop cotton to a gin different than the gin to which the producer delivered 2003-crop cotton, or delivered cotton to more than one gin in either 2003 or 2004, the gin receiving 2004-crop cotton shall contact the other gins for production information or obtain other proof of the eligible quantity from the cotton producer so as to make or verify the calculation called for in paragraph (a) of this section.

(d) If the cotton producer did not produce 2003-crop cotton the producer shall be considered a new producer. A new producer's eligible lost quantity will be determined as provided in paragraph (a) of this section except that the amount of loss of lint will be made by comparing the producer's actual 2004 per-acre yield with the 2003 USDA, National Agricultural Statistics Service county average yield for the applicable county.

(e) The gin's lint eligibility will be calculated individually with respect to all eligible cotton producers and those individual eligibilities for the gin will then be added together to determine the total lint eligibility of the gin. From that amount of lint eligibility, the applicant gin's payment quantity of cottonseed shall be calculated by CCC by multiplying:

(1) The applicant gin's eligible weight of lint for which payment is requested, as approved by CCC, and as determined

in paragraphs (a) through (d) of this section by;

(2) The Olympic average of estimated pounds of cottonseed per pound of ginned cotton lint, as determined by CCC, for the five years preceding the 2004 crop year.

■ 10. Revise § 1427.1108 to read as follows:

§ 1427.1108 Total payment quantity.

The total quantity of 2004-crop cottonseed eligible under this subpart shall be based on the total payment quantity of cottonseed as determined under this subpart for which timely applications are filed. Eligible cottonseed for which no application is received according to announced application instructions shall not be included in the total payment quantity of cottonseed. The total payment quantity of cottonseed (ton-basis) shall be calculated by multiplying:

(a) The total weight of cotton lint, converted to tons, for which payment is requested by all applicants, as approved by CCC, by

(b) The Olympic average of estimated pounds of cottonseed per pound of ginned cotton lint, as determined by CCC for the five years preceding the 2004 crop year.

■ 11. Revise § 1427.1109 to read as follows:

§ 1427.1109 Payment rate.

The payment rate (dollars per ton) shall be determined by CCC by dividing the total available program funds by the total eligible payment quantity of cottonseed. However, in no event may the total payment to an eligible applicant exceed $114 per ton of cottonseed multiplied by the applicant's total eligible payment quantity.

■ 12. Amend § 1427.1111 by revising paragraph (d) to read as follows:

§ 1427.1111 Liability of first handler.

* * * * *

(d) For 3 years after the date of the application for 2004-crop payments, the applicant shall keep records, including records supporting the quantity of cottonseed for which payment was requested, and furnish such information and reports relating to the application to CCC as requested. Such records shall be available at all reasonable times for an audit or inspection by authorized representatives of CCC, United States Department of Agriculture, or the Comptroller General of the United States. Failure to keep, or make available, such records may result in refund to CCC of all payments received, plus interest thereon, as determined by CCC. In the event of a controversy concerning payments, records must be kept for such longer period as may be specified by CCC until such controversy is resolved. Destruction of records at any time is at the risk of the applicant.

Signed in Washington, DC, on January 12, 2006.

Teresa C. Lasseter,

Executive Vice President, Commodity Credit Corporation.

[FR Doc. 06–742 Filed 1–25–06; 8:45 am]

BILLING CODE 3410–05–P

NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Parts 701 and 741

Uninsured Secondary Capital

AGENCY: National Credit Union Administration (NCUA).

ACTION: Final rule.

SUMMARY: The National Credit Union Administration (NCUA) is adopting modifications to its rules on uninsured secondary capital accounts to allow low-income designated credit unions to begin redeeming the funds in those accounts when they are within five years of maturity, and to require prior approval of a plan for the use of uninsured secondary capital before a credit union can begin accepting the funds.

DATES: This rule is effective February 27, 2006.

FOR FURTHER INFORMATION CONTACT: Steven W. Widerman, Trial Attorney, Office of General Counsel, at 703/518–6557; or Margaret Miller, Program Officer, Office of Examination and Insurance, at 703/518–6375.

SUPPLEMENTARY INFORMATION:

A. Background

1. *Uninsured secondary capital accounts.* Under conditions prescribed by the NCUA Board, credit unions serving predominantly low-income members are permitted by law to receive payments on shares from non-natural persons. 12 U.S.C. 1757(6). In 1996, the NCUA Board authorized low-income designated credit unions (''LICUs''),[1] including State-chartered credit unions to the extent permitted by State law, to accept uninsured secondary capital (''USC'') from non-natural person members and nonmembers. 12 CFR 701.34(b) (2005). The purpose of USC is to provide a further means—beyond setting aside a portion of earnings—for LICUs to build capital to support greater lending and financial services in their communities, and to absorb losses and thus protect LICUs from failing. 61 FR 3788 (Feb. 2, 1996); 61 FR 50696 (Sept 27, 1996).

To ensure the safety and soundness of LICUs that accept USC, the existing rule imposed multiple restrictions that also apply to State-chartered LICUs. 12 CFR 741.204. Before accepting USC, a LICU must submit a written plan for the use and repayment of USC. § 701.34(b)(1). USC accounts must have a minimum maturity of five years and may not be redeemable prior to maturity. § 701.34(b)(3)–(4). The accounts must be established as uninsured, non-share instruments. § 701.34(b)(2) and (5). And most importantly, USC funds on deposit (including interest paid into the account) must be available to cover operating losses in excess of the LICU's net available reserves and undivided earnings. § 701.34(b)(7). Funds used to cover such losses may not be replenished or restored to the USC accounts. *Id.*

2. *Impact of Prompt Corrective Action.* Since the inception of USC, existing § 701.34(c)(1) has required LICUs to discount a USC account's original capital value (now called ''net worth value'')—essentially recategorizing the discounted portion as subordinated debt—in 20 percent annual increments beginning at five years remaining maturity. Even as its capital value is discounted, however, the full amount of USC must remain on deposit to cover losses. § 701.34(c)(2) (2005).

In 2000, pursuant to Congressional mandate, NCUA adopted a system of ''prompt corrective action'' (''PCA'') consisting of mandatory minimum capital standards indexed by a credit union's ''net worth ratio'' to five statutory net worth categories.[2] 12 U.S.C. 1790d; 12 CFR part 702; 65 FR 8560 (Feb. 18, 2000). As a credit union's net worth ratio falls, its classification among the net worth categories declines below ''well capitalized,'' thus exposing it to an expanding range of mandatory and discretionary supervisory actions

[1] The NCUA Board is authorized by law to define ''credit unions serving predominantly low-income members.'' 12 U.S.C. 1757(6). To be so designated by the appropriate Regional Director, the NCUA Board generally requires the majority of a credit union's members to earn less than 80 percent of the average national wage as determined by the Bureau of Labor Statistics, or to have annual household incomes below 80 percent of the national median as determined by the Census Bureau. 12 CFR 701.34(a)(2)–(3).

[2] The ''net worth'' of a LICU is defined by law as its retained earnings under GAAP plus any USC on deposit. 12 U.S.C. 1790d(o)(2); 12 CFR 702.2(f). The ''net worth ratio'' of a credit union is the ratio of its net worth to its total assets. 12 U.S.C. 1790d(o)(3); 12 CFR 702.2(g) and (k).

designed to restore net worth. *E.g.,* 12 CFR 702.201(a), 702.202(a), 702.204(b).

Because of PCA, discounting the net worth value of USC beginning at five years remaining maturity reduces a LICU's net worth ratio. While the ''net worth'' numerator of the ratio is reduced at the rate of 20 percent annually, the ''assets'' denominator must remain the same because of the existing rule's restriction on redeeming USC accounts prior to maturity. § 701.34(b)(4) (2005). The result is that discounting the net worth value of USC dilutes a LICU's net worth ratio, threatening to lower its classification among the PCA net worth categories.

3. *2005 Proposed Rule.* December 2004 Call Report data indicated that a significant number of LICUs are exposed to the risk that discounting the value of their USC will dilute their net worth ratio. 70 FR 43789 (July 29, 2005).[3] For this reason, the NCUA Board issued a proposed rule allowing low-income designated credit unions that have USC accounts to begin redeeming the funds in those accounts when they are within five years of maturity. 70 FR 43789. To discourage the misuse of USC, the proposed rule also requires prior approval, not just submission, of a plan for the use and repayment of the aggregate USC before a LICU can accept USC accounts. *Id.*

NCUA received four comments in response to the proposed rule, all from credit union industry trade associations representing different segments of the industry. One commenter supported without reservation the proposal to allow redemption of USC accounts prior to maturity; the other three supported the proposal subject to their comments discussed below. One commenter supported without reservation the proposal to require prior approval of a plan for the use and repayment of USC; the other three opposed the requirement altogether for reasons given in their comments discussed below. Suggested revisions to the existing regulation beyond those introduced in the proposed rule also are addressed below.

B. Analysis of Comments on Proposed Rule

1. Redemption of Secondary Capital Prior to Maturity

To protect a LICU's net worth ratio from being diluted by discounting the net worth value of its USC, the proposed rule introduced new subsection (d) eliminating the existing bar against redemption and, instead, prescribing conditions under which LICU's may redeem discounted USC prior to maturity.

Prepayment Risk. Two commenters noted that the proposed rule fails to address the ''prepayment risk'' for account investors created by permitting LICUs to redeem USC prior to maturity, and also does not disclose that risk in the ''Disclosure & Acknowledgement'' form in the Appendix to § 701.34. ''Prepayment risk'' is the risk that, to the extent USC is repaid earlier than the final maturity date, the account investor may be deprived of expected interest income because it will be unable to reinvest the repaid funds at the same rate of interest for the balance of the period remaining until the original maturity date. This risk represents a legitimate concern. USC investors can protect themselves from prepayment risk to the extent they contract with the LICU to limit or bar redemption prior to maturity of the investor's account. To the extent the parties are silent about redemption prior to maturity, the ''Disclosure and Acknowledgement'' in Appendix A to § 701.34 is amended to put the investor on notice as follows:

> 4. *Prepayment and other risks.* Redemption of USC prior to the account's original maturity date may expose the account investor to the risk of being unable to reinvest the repaid funds at the same rate of interest for the balance of the period remaining until the original maturity date. The investor acknowledges that it understands and assumes responsibility for prepayment risk associated with [name of credit union]'s redemption of the investor's USC account prior to the original maturity date.''

Redemption in Final Year Prior to Maturity. The new schedule for redeeming USC does not provide for redemption of the last twenty percent increment of discounted USC during the final year prior to maturity. § 701.34(d)(3). As the proposed rule explained, this last increment of discounted USC will be redeemed at the account's final maturity date. 70 FR at 43790. Two commenters asked why LICUs are not allowed to redeem the last increment of discounted USC *during* the final year, *i.e., before* the account's final maturity date. The reason is that, to fulfill its most important purpose, the final twenty percent increment must remain available to cover operating losses until the final maturity date, even as its net worth value is discounted to zero. § 701.34(c)(2). If LICUs were permitted to redeem the last twenty percent increment *before* the account's maturity, there would be no USC on deposit to cover post-redemption operating losses arising prior to the final maturity date. Thus, the final rule retains the new schedule for redemption as proposed. § 701.34(d)(3).

Minimum post-redemption net worth classification. To redeem discounted USC, the proposed rule required a LICU to have a post-redemption net worth classification of ''well capitalized.'' 70 FR at 43790. However, a credit union that would be ''adequately capitalized'' after redeeming discounted USC could apply on a case-by-case basis for Regional Director approval to redeem. *Id.* It is apparent upon reconsideration that this requirement for ''adequately capitalized'' credit unions is redundant because each credit union's request to redeem, regardless of post-redemption net worth, already receives subjective, case-by-case evaluation and approval. Moreover, the post-redemption difference between a ''well capitalized'' and an ''adequately capitalized'' credit union is that PCA subjects the latter to a single ''mandatory supervisory action'': The requirement to make quarterly contributions of earnings to build net worth.

One commenter asked why the proposed rule did not allow a LICU to redeem discounted USC if its post-redemption net worth classification would be *less than* ''adequately capitalized'' (*i.e.*, a net worth ratio of 5.99 percent or less). There are three reasons for setting a minimum post-redemption net worth ''floor'' at ''adequately capitalized.'' First, very few LICUs would be affected because typically only a handful (five or less as of June 2005) would have a net worth classification of less than ''adequately capitalized'' after redeeming their discounted USC. Second, among all LICUs that accept USC, redeeming discounted USC would rarely increase one's net worth ratio significantly enough to raise a LICU to a higher net worth category. And third, on rare occasions when redemption *would* raise a LICU to a higher category, as long as it still is below ''adequately capitalized,'' the LICU would remain burdened with the full range of ''mandatory supervisory actions'' that PCA imposes on the bottom three net worth categories.[4] Prohibiting

[3] June 2005 data shows that 55 LICUs have USC accounts. These accounts have an aggregate balance of $30 million in USC. Of these LICUs, 46 are classified ''well capitalized'' and 4 are classified ''adequately capitalized,'' indicating that 89 percent currently have net worth ratios that subject them to little or no PCA.

[4] In addition to making quarterly transfers of earnings to build net worth, credit unions in the ''undercapitalized,'' ''significantly undercapitalized'' and ''critically undercapitalized'' net worth categories must comply with three further ''mandatory supervisory actions'': (1) A freeze on total assets; (2) a freeze on the balance of MBLs; and (3) the requirement to submit a net worth

Continued

redemption by credit unions that remain in these categories furthers the goal of maximizing their cushion against operating losses that otherwise would be borne by the Share Insurance Fund.

For these reasons, the final rule retains ''adequately capitalized'' as the minimum post-redemption net worth ''floor'' for redeeming discounted USC.

Resolution Authorizing Redemption. The proposed rule requires that a LICU's request to redeem USC be authorized by a resolution of the credit union's board of directors. 70 FR at 43790. The rule explained that the purpose of a board resolution is to ''document[] that a majority of the board participated in a board decision. Maximum board member participation in deciding to redeem SC helps to overcome possible conflicts of interest between LICU officials and officials of the SC account holder.'' *Id.* A commenter asks either that this rationale be further explained, or that the resolution requirement be eliminated from the final rule.

The final rule retains the resolution requirement as proposed, but further explains its purpose as follows. In many instances, a LICU in search of USC and potential USC investors are identified and brought together by one or more individual officials of each party to the transaction. These individuals sometimes have pre-existing familial or business relationships that may impair their independence and fidelity to the interests of the party they represent. On the assumption that the credit union official who was the ''finder'' of the USC investor is singularly able to consummate the transaction, the natural tendency of credit union officials is to defer to that person's knowledge and judgment. Excessive reliance on knowledge and judgment concentrated in one or a few individuals allows them to be unduly influential in the making of decisions relating to the transaction.

In the case of USC investments, the dominant influence of the ''finder(s)'' may extend to deciding whether to accommodate an investor's wish to redeem its USC account at the earliest opportunity, thus realizing a prepayment award (through reinvestment at more favorable interest rate), or to forestall redemption to avoid prepayment risk (requiring reinvestment at a less favorable interest rate). A resolution of a credit union's board of directors would ensure that such a decision is made by the board as a whole, is consistent with the credit union's best interests, and is transparent. For these reasons, the final rule requires that a LICU's request to redeem discounted USC be embodied in a duly authorized resolution of its board of directors.

Timing and scope of request to redeem. The proposed rule provided that ''a request to redeem discounted secondary capital must be submitted in writing on an annual basis.'' § 701.34(d)(1). The preamble explained that a request ''must be submitted for each year preceding maturity (unless the Regional Director indicates in writing that the approval is for more than one year).'' 70 FR at 43790. A commenter asks if this means that a redemption request may be submitted *only* once a year, thus precluding more than one request per year. The answer is no.

To ensure that redemption requests may be submitted at any time and may be broadly framed, the final rule is revised to allow a request to be submitted ''at any time'' so long as it ''specif[ies] the increment(s) to be redeemed and the schedule for redeeming all or any part of each eligible increment.'' As a result, LICUs will have the option to, for example, seek approval extending beyond the current year, thus allowing future years' increments of discounted USC to be redeemed as they become eligible; or to redeem a year's increment in installments timed to correspond with the availability of liquidity from maturing instruments and availability of sources of lower cost funds. Finally, to give Regional Directors maximum flexibility in addressing redemption requests that may be ambitious in scope, the final rule has been revised to provide that: ''A request to redeem discounted secondary capital may be granted in whole or in part.''

2. Pre-Approval of Plan for Use of Uninsured Secondary Capital

Existing § 701.34(b) requires a LICU that is planning to accept USC accounts to forward to the appropriate Regional Director (and to the appropriate State Supervisory Authority (''SSA'') in the case of State-chartered LICU) a written plan for the use of the aggregate funds in those accounts and ''subsequent liquidity needs'' to repay them upon maturity (''Plan''). § 701.34(b)(1); 12 CFR 741.204(c). No Regional Director or SSA approval is required. In contrast, the proposed rule requires prior regulatory approval of a USC Plan, subject to certain matters the Plan must address, before USC accounts can be accepted.[5] § 701.34(b). As proposed, a USC Plan need not be submitted for each account individually; rather it may address the maximum aggregate USC that a LICU expects to receive.

Misuse of Secondary Capital. A principal reason for requiring approval—not just submission—of a LICU's USC Plan is to ensure that USC is used to achieve the goals for which it was conceived, *i.e.* building capital to support expansion of lending and financial services in LICUs' communities, and to serve as a cushion against losses. 61 FR 3788 (Feb. 2, 1996). Emphasizing that USC is disclosed in a LICU's quarterly Call Report, three commenters questioned the proposed rule's conclusion that ''SC played a role in masking the magnitude of other problems'' that caused LICUs to fail. 70 FR at 43791. One assumed that those cases ''undoubtedly involved fraud and/or major recordkeeping deficiencies'' and thus were atypical. Two commenters contended that requiring prior approval of USC Plans would not improve safety and soundness enough to justify the additional burden on credit unions. And the third objected that that burden creates an additional step that could discourage potential investors from entering the USC market.

Net worth is a reliable—if sometimes lagging—indicator of operational problems and poor financial performance that threaten a credit union's solvency. Full disclosure of a LICU's USC balance distinguishes the portion of net worth derived from earnings generated by routine credit union operations, in contrast to the portion derived from subordinated debt that ultimately must be repaid. However, this quantitative distinction tells us nothing about a LICU's qualitative use of USC, which in terms of risk to credit union safety and soundness, can range from negligible to perilous.

Contrary to a commenter's assumption, the problems that the final rule addresses generally are not solely the result of fraud and deficient recordkeeping. Rather, they reflect an emerging pattern of lenient practices that frustrate LICUs' good faith use of USC. These practices include: (1) Poor due diligence and strategic planning in connection with establishing and expanding member service programs such as ATMs, share drafts and lending (*e.g.*, member business loans (''MBLs'') real estate and subprime); (2) Failure to

restoration plan for approval. 12 U.S.C. 1790d(f)–(g); 12 CFR 702.202(a).

[5] Approval will be required oly for USC Plans submitted on or after the effective date of this final rule; Plans submitted before that date will not be affected. However, no USC Plan is necessary for funds received after the effective date pursuant to a Plan adopted and submitted before the effective date.

adequately perform a prospective cost/benefit analysis of these programs to assess such factors as market demand and economies of scale; (3) Premature and excessively ambitious concentrations of USC to support unproven or poorly performing programs; and (4) Failure to realistically assess and timely curtail programs that, in the face of mounting losses, are not meeting expectations. When they occur, these lenient practices contribute to excessive net operating costs, high losses from loan defaults, and a shortfall in revenues (due to non-performing loans and poorly performing programs)—all of which, in turn, produce lower than expected returns.

Promoting diligent practices in place of lenient ones cannot help but improve the safety and soundness of LICUs. Requiring prior approval of a USC Plan will strengthen supervisory oversight and detection of lenient practices in several ways. First, it will prevent LICUs from accepting and using USC for purposes and in amounts that are improper or unsound. Second, the approval requirement will ensure that USC Plans are evaluated and critiqued by the Region before being implemented. Third, for both NCUA and the LICU, an approved USC Plan will document parameters to guide the proper implementation of USC, and to measure the LICU's progress and performance. For these reasons, the final rule requires prior Regional Director approval of a USC Plan.

Finally, to the extent that obtaining prior approval adds a step that might cause undue delay, possibly discouraging potential investors from entering the USC market, the final rule provides a backstop. A Regional Director has 45 days from the date a USC Plan is submitted to approve or disapprove it. However, the final rule provides that if a Regional director fails to act on a USC Plan within that period, the Plan is approved by default and ''the LICU may proceed to accept secondary capital accounts pursuant to the plan.'' § 701.34(b)(2).

Regional Director discretion to approve Plan. Before accepting USC accounts, the proposed rule required a LICU to forward its USC Plan to the appropriate NCUA Regional Director for approval. § 701.34(b)(1). One commenter objected that this approval authority ''places excessive discretion in the hands of the agency's regional directors.'' The NCUA Board believes the degree of Regional Director discretion is appropriate for two reasons. First, because the final rule establishes four criteria on which a decision to approve or disapprove must be based: how the LICU will USC in the aggregate; how it will provide for subsequent liquidity to repay the accounts; whether the use of USC conforms to the LICU's strategic plan, business plan and budget; and whether the Plan is supported by two years of pro forma financial statements. And second, in assessing those criteria, the Regional Director will be relying on input from the examiner who regularly oversees the credit union and, thus, is well-suited to judge its capabilities. For these reasons, the NCUA Board is content to give its Regional Directors the authority to take final agency action on USC Plans. Accordingly, the final rule retains as proposed the requirement for Regional Director prior approval of USC Plans.

Pro forma financial statements. To the existing criteria for approval of a Plan, the proposed rule adds the requirement to demonstrate that the intended use of USC conforms to the accepting LICU's strategic plan, business plan and budget; and is supported by accompanying pro forma financial statements, including any off-balance sheet items, covering a minimum of the next two years. § 701.34(b)(1)(iv). As the proposed rule noted, the purpose of this criterion ''is to project and document the future financial performance of the LICU in relation to the risks associated with accepting USC accounts.'' 70 FR at 43791. Nonetheless, the single commenter who addressed this requirement objected, without explanation, that it is ''unnecessary'' for a USC Plan to be supported and accompanied by pro forma financial statements. NCUA maintains that pro forma financial statements are a routine, yet essential, tool for documenting and testing the soundness of the assumptions a credit union relies on to project future performance. Pro forma financial statements benefit credit union management by measuring differences between planned and actual performance. And pro forma financial statements facilitate regulatory evaluation and supervisory oversight of USC Plans.

3. Other Comments

The commenters suggested several revisions to the existing § 701.34(b) beyond those introduced in the proposed rule.

Use of Secondary Capital to Pay Dividends. In both the existing and the proposed rule, the essential feature of USC is that it ''must be available to cover operating losses realized by the credit union'' in excess of its net worth. § 701.34(b)(7). Two commenters advocate revising the final rule to clarify whether the payment of dividends is within or beyond the scope of ''operating losses realized by the credit union.'' Most contend that it is beyond the scope and thus should not be subsidized by USC.

The Federal Credit Union Act addresses this issue by allowing a credit union's board of directors to declare a dividend only ''after provision for required reserves.'' 12 U.S.C. 1763; *see also* 12 U.S.C. 1761b(18). The prerequisite to have reserves from which to fund dividends means that USC cannot be used to create reserves for that purpose where none exists. Thus, a credit union may declare dividends only to the extent it has reserves available. After fully posting and measuring net income, including completing provisioning for Allowance for Loan and Lease Losses and measuring it against net income, a credit union may declare and pay dividends only to the extent that it has reserves and undivided earnings *exclusive of USC.* The final rule revises the ''Disclosure and Acknowledgement'' form in the Appendix to § 701.34 to clearly establish that ''Dividends are not considered operating losses and thus are not eligible to be paid out of secondary capital.''

Replenishment of Secondary Capital Account. Both the existing and the proposed rule state that, to the extent an USC account is used to cover ''operating losses,'' the LICU ''shall under no circumstances restore or replenish the account.'' § 701.34(b)(7) (2005). Two commenters believe that this restriction should be withdrawn so that a LICU could replenish USC accounts should it subsequently regain financial health. To do so would be inconsistent with the purpose of USC accounts, as explained in the final rule that first established the accounts: ''Permitting LICUs to replenish SC once financial health has been regained would defeat the purpose for establishing secondary capital. The goal of secondary capital is to enhance capital positions. The potential growth of primary capital could be slowed by allowing LICUs to replenish investor funds in the event those funds are depleted. Additionally, permitting replenishment could be interpreted as ''guaranteed return of principal'' by the investor which was not the Board's original intent.'' 61 FR at 50696. For these reasons, the final rule retains the restriction against restoring or replenishing USC accounts. § 701.34(b)(7).

Suspension of Dividend and Interest Payments. The proposed rule combines two subsections of the existing rule into a single, abbreviated section explaining

NCUA's authority to suspend ''critically undercapitalized'' LICUs from paying principal, interest and dividends on USC accounts established after August 7, 2000, the date PCA became effective. § 701.34(12). The sole commenter on this section advocated repealing this authority. Because it is indirectly prescribed by law for ''critically undercapitalized'' credit unions,[6] the authority to suspend payments of principal, interest and dividends on USC accounts is not subject to repeal through the rulemaking process. Like the existing rule, the proposed subsection simply puts USC investors on notice of the possibility of a suspension of such payments in the event the LICU becomes ''critically undercapitalized.'' It is therefore retained as proposed. § 701.34(b)(12).

Regulatory Procedures

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) requires NCUA to prepare an analysis describing any significant economic impact a proposed regulation may have on a substantial number of small credit unions. NCUA considers credit unions having less than ten million dollars ($10,000,000) to be small for purposes of the RFA. The final rule allows credit unions to begin redeeming USC accounts when they are within five years of maturity, and requires them to obtain prior approval of a plan for the use and repayment of USC, without imposing any additional regulatory burden. The final rule will not have a significant economic impact on a substantial number of small credit unions. Thus, a Regulatory Flexibility Analysis is not required.

[6] Congress directed NCUA to make the system of PCA developed for insured credit unions ''comparable'' with the 1991 law (12 U.S.C. 1831o) that mandated PCA for all other federally-insured depository institutions. 12 U.S.C. 1790d(b)(1)(A)(ii). That law authorized the Federal banking agencies to prohibit payments of principal or interest on a ''critically undercapitalized'' institution's subordinated debt. 12 U.S.C. 1831o(h)(2)(A). The Federal Deposit Insurance Corporation rule implementing that authority, for example, makes the prohibition *mandatory.* 12 CFR 325.105(a)(4)(H). To be comparable with § 1831o(h)(2)(A) as Congress instructed, part 702 established a ''discretionary supervisory action'' allowing, *but not requiring,* NCUA to ''prohibit payents of principal, dividends or interest on the credit union's uninsured secondary capital accounts * * *, excpet that unpaid dividends or interest shall continue to accure under the terms of the account * * *.'' 12 CFR 702.204(b)(11). *See* 64 FR 27090, 27098 (May 18, 1999); 65 FR 8560, 8674 (Feb. 18, 2000). Section 701.34(b) was amended in 2000 to reflect the addition of this ''discretionary supervisory authority.'' 65 FR 21129 (April 20, 2000).

Paperwork Reduction Act

NCUA has determined that the final rule would not increase paperwork requirements under the Paperwork Reduction Act of 1995 and regulations of the Office of Management and Budget. NCUA currently has OMB clearance for the collection requirements in § 701.34 and part 741 (OMB Nos. 3133–0140, 3133–0099, 3133–142 and 3133–163).

Executive Order 13132

Executive Order 13132 encourages independent regulatory agencies to consider the impact of their regulatory actions on State and local interests. NCUA, an independent regulatory agency as defined in 44 U.S.C. 3502(5), voluntarily adheres to the fundamental federalism principles addressed by the executive order. This final rule would not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Accordingly, this final rule does not constitute a policy that has federalism implications for purposes of the Executive Order.

Small Business Regulatory Enforcement Fairness Act

The Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121) provides generally for congressional review of agency rules. A reporting requirement is triggered in instances where NCUA issues a final rule as defined by Section 551 of the Administrative Procedures Act. 5 U.S.C. 551. NCUA submitted the rule to the Office of Management and Budget, which has determined that it is not major for purposes of the Small Business Regulatory Enforcement Fairness Act of 1996.

Treasury and General Government Appropriations Act, 1999

NCUA has determined that the proposed rule will not affect family well-being within the meaning of section 654 of the Treasury and General Appropriations Act, 1999, Pub. L. 105–277, 112 Stat. 2681 (1998).

List of Subjects in 12 CFR Parts 701 and 741

Bank deposit insurance, Credit Unions, Reporting and recordkeeping requirements.

By the National Credit Union Administration Board on January 19, 2006.

Mary F. Rupp,

Secretary of the Board.

■ For the reasons set forth above, 12 CFR parts 701 and 741 are amended as follows:

PART 701—ORGANIZATION AND OPERATIONS OF FEDERAL CREDIT UNIONS

■ 1. The authority citation for part 701 continues to read as follows:

Authority: 12 U.S.C. 1752(5), 1755, 1756, 1757, 1759, 1761a, 1761b, 1766, 1767, 1782, 1784, 1787, 1789 and Public Law 101–73. Section 701.6 is also authorized by 31 U.S.C. 3717. Section 701.31 is also authorized by 12 U.S.C. 1601 *et seq.*, 42 U.S.C. 1981 and 42 U.S.C. 3601–3610. Section 701.35 is also authorized by 12 U.S.C. 4311–4312.

■ 2. Amend § 701.34 as follows:
■ a. Revise the section heading to read as set forth below;
■ b. Revise paragraphs (b) and (c) to read as set forth below;
■ c. Add new paragraph (d) before the Appendix to § 701.34 to read as set forth below; and
■ d. Revise the Appendix to § 701.34 following new paragraph (d) to read as follows:

§ 701.34 Designation of low income status; Acceptance of secondary capital accounts by low-income designated credit unions.

* * * * *

(b) *Acceptance of secondary capital accounts by low-income designated credit unions.* A federal credit union having a designation of low-income status pursuant to paragraph (a) of this section may accept secondary capital accounts from nonnatural person members and nonnatural person nonmembers subject to the following conditions:

(1) *Secondary capital plan.* Before accepting secondary capital, a low-income credit union (''LICU'') shall adopt, and forward to the appropriate NCUA Regional Director for approval, a written ''Secondary Capital Plan'' that, at a minimum:

(i) States the maximum aggregate amount of uninsured secondary capital the LICU plans to accept;

(ii) Identifies the purpose for which the aggregate secondary capital will be used, and how it will be repaid;

(iii) Explains how the LICU will provide for liquidity to repay secondary capital upon maturity of the accounts;

(iv) Demonstrates that the planned uses of secondary capital conform to the LICU's strategic plan, business plan and budget; and

(v) Includes supporting pro forma financial statements, including any off-

balance sheet items, covering a minimum of the next two years.

(2) *Decision on plan.* If a LICU is not notified within 45 days of receipt of a Secondary Capital Plan that the plan is approved or disapproved, the LICU may proceed to accept secondary capital accounts pursuant to the plan.

(3) *Nonshare account.* The secondary capital account must be established as an uninsured secondary capital account or other form of non-share account.

(4) *Minimum maturity.* The maturity of the secondary capital account must be a minimum of five years.

(5) *Uninsured account.* The secondary capital account will not be insured by the National Credit Union Share Insurance Fund or any governmental or private entity.

(6) *Subordination of claim.* The secondary capital account investor's claim against the LICU must be subordinate to all other claims including those of shareholders, creditors and the National Credit Union Share Insurance Fund.

(7) *Availability to cover losses.* Funds deposited into a secondary capital account, including interest accrued and paid into the secondary capital account, must be available to cover operating losses realized by the LICU that exceed its net available reserves (exclusive of secondary capital and allowance accounts for loan and lease losses), and to the extent funds are so used, the LICU must not restore or replenish the account under any circumstances. The LICU may, in lieu of paying interest into the secondary capital account, pay accrued interest directly to the investor or into a separate account from which the secondary capital investor may make withdrawals. Losses must be distributed pro-rata among all secondary capital accounts held by the LICU at the time the losses are realized.

(8) *Security.* The secondary capital account may not be pledged or provided by the account investor as security on a loan or other obligation with the LICU or any other party.

(9) *Merger or dissolution.* In the event of merger or other voluntary dissolution of the LICU, other than merger into another LICU, the secondary capital accounts will be closed and paid out to the account investor to the extent they are not needed to cover losses at the time of merger or dissolution.

(10) *Contract agreement.* A secondary capital account contract agreement must be executed by an authorized representative of the account investor and of the LICU reflecting the terms and conditions mandated by this section and any other terms and conditions not inconsistent with this section.

(11) *Disclosure and acknowledgement.* An authorized representative of the LICU and of the secondary capital account investor each must execute a ''Disclosure and Acknowledgment'' as set forth in the Appendix to this section at the time of entering into the account agreement. The LICU must retain an original of the account agreement and the ''Disclosure and Acknowledgment'' for the term of the agreement, and a copy must be provided to the account investor.

(12) *Prompt corrective action.* As provided in §§ 702.204(b)(11), 702.304(b) and 702.305(b) of this chapter, the NCUA Board may prohibit a LICU classified ''critically undercapitalized'' or, if ''new,'' as ''moderately capitalized'', ''marginally capitalized'', ''minimally capitalized'' or ''uncapitalized'', as the case may be, from paying principal, dividends or interest on its uninsured secondary capital accounts established after August 7, 2000, except that unpaid dividends or interest will continue to accrue under the terms of the account to the extent permitted by law.

(c) *Accounting treatment; Recognition of net worth value of accounts.* (1) *Equity account.* A LICU that issues secondary capital accounts pursuant to paragraph (b) of this section must record the funds on its balance sheet in an equity account entitled ''uninsured secondary capital account.''

(2) *Schedule for recognizing net worth value.* For accounts with remaining maturities of less than five years, the LICU must reflect the net worth value of the accounts in its financial statement in accordance with the following schedule:

Remaining maturity	Net worth value of original balance (percent)
Four to less than five years	80
Three to less than four years ...	60
Two to less than three years	40
One to less than two years	20
Less than one year	0

(3) *Financial statement.* The LICU must reflect the full amount of the secondary capital on deposit in a footnote to its financial statement.

(d) *Redemption of secondary capital.* With the written approval of the appropriate Regional Director, secondary capital that is not recognized as net worth under paragraph (c)(2) of this section (''discounted secondary capital'' recategorized as subordinated debt) may be redeemed according to the remaining maturity schedule in paragraph (d)(3) of this section.

(1) *Request to redeem secondary capital.* A request for approval to redeem discounted secondary capital may be submitted in writing at any time, must specify the increment(s) to be redeemed and the schedule for redeeming all any part of each eligible increment, and must demonstrate to the satisfaction of the appropriate Regional Director that:

(i) The LICU will have a post-redemption net worth classification of ''adequately capitalized'' under part 702 of this chapter;

(ii) The discounted secondary capital has been on deposit at least two years;

(iii) The discounted secondary capital will not be needed to cover losses prior to final maturity of the account;

(iv) The LICU's books and records are current and reconciled;

(v) The proposed redemption will not jeopardize other current sources of funding, if any, to the LICU; and

(vi) The request to redeem is authorized by resolution of the LICU's board of directors.

(2) *Decision on request.* A request to redeem discounted secondary capital may be granted in whole or in part. If a LICU is not notified within 45 days of receipt of a request for approval to redeem secondary capital that its request is either granted or denied, the LICU may proceed to redeem secondary capital accounts as proposed.

(3) *Schedule for redeeming secondary capital.*

Remaining maturity	Redemption limit as percent of original balance
Four to less than five years	20
Three to less than four years ...	40
Two to less than three years	60
One to less than two years	80

Appendix to § 701.34

A LICU that is authorized to accept uninsured secondary capital accounts and each investor in such an account shall execute and date the following ''Disclosure and Acknowledgment'' form, a signed original of which must be retained by the credit union:

Disclosure and Acknowledgment

[Name of CU] and [Name of investor] hereby acknowledge and agree that [Name of investor] has committed [amount of funds] to a secondary capital account with [name of credit union] under the following terms and conditions:

1. *Term.* The funds committed to the secondary capital account are committed for a period of ____ years.

2. *Redemption prior to maturity.* Subject to the conditions set forth in 12 CFR 701.34, the funds committed to the secondary capital account are redeemable prior to maturity

only at the option of the LICU and only with the prior approval of the appropriate regional director.

3. *Uninsured, non-share account.* The secondary capital account is not a share account and the funds committed to the secondary capital account are not insured by the National Credit Union Share Insurance Fund or any other governmental or private entity.

4. *Prepayment risk.* Redemption of U.S.C. prior to the account's original maturity date may expose the account investor to the risk of being unable to reinvest the repaid funds at the same rate of interest for the balance of the period remaining until the original maturity date. The investor acknowledges that it understands and assumes responsibility for prepayment risk associated with the [name of credit union]'s redemption of the investor's U.S.C. account prior to the original maturity date.

5. *Availability to cover losses.* The funds committed to the secondary capital account and any interest paid into the account may be used by [name of credit union] to cover any and all operating losses that exceed the credit union's net worth exclusive of allowance accounts for loan losses, and in the event the funds are so used, (name of credit union) will under no circumstances restore or replenish those funds to [name of institutional investor]. Dividends are not considered operating losses and are not eligible to be paid out of secondary capital.

6. *Accrued interest.* By initialing below, [name of credit union] and [name of institutional investor] agree that accrued interest will be:

____Paid into and become part of the secondary capital account;
____Paid directly to the investor;
____Paid into a separate account from which the investor may make withdrawals; or
____Any combination of the above provided the details are specified and agreed to in writing.

7. *Subordination of claims.* In the event of liquidation of [name of credit union], the funds committed to the secondary capital account will be subordinate to all other claims on the assets of the credit union, including claims of member shareholders, creditors and the National Credit Union Share Insurance Fund.

8. *Prompt Corrective Action.* Under certain net worth classifications (*see* 12 CFR 702.204(b)(11), 702.304(b) and 702.305(b), as the case may be), the NCUA Board may prohibit [name of credit union] from paying principal, dividends or interest on its uninsured secondary capital accounts established after August 7, 2000, except that unpaid dividends or interest will continue to accrue under the terms of the account to the extent permitted by law.

ACKNOWLEDGED AND AGREED TO this __ day of [month and year] by:

_____
[name of investor's official]
[title of official]
[name of investor]
[address and phone number of investor]
[investor's tax identification number]

_____
[name of credit union official]
[title of official]

PART 741—REQUIREMENTS FOR INSURANCE

■ 1. The authority citation for part 741 continues to read as follows:

Authority: 12 U.S.C. 1757, 1766, 1781—1790, and 1790d. Section 741.4 is also authorized by 31 U.S.C. 3717.

■ 2. Amend § 741.204 as follows:

■ a. Remove from paragraph (c) the citation ''§ 701.34'' wherever it appears and add in its place the citation ''§ 701.34(b)(1)'';

■ b. Revise the second sentence of paragraph (c) and add a new third sentence to read as set forth below; and

■ c. Add new paragraph (d) to read as set forth below:

§ 741.204 Maximum public unit and nonmember accounts, and low income designation.

* * * * *

(c) * * * State chartered federally insured credit unions offering secondary capital accounts must submit the plan required by § 701.34(B)(1) to both the state supervisory authority and the NCUA Regional Director for approval. The state supervisory authority must approve or disapprove the plan with the concurrence of the appropriate NCUA Regional Director.

(d) Redeem secondary capital accounts only in accordance with the terms and conditions authorized for federal credit unions pursuant to § 701.34(d) of this chapter and to the extent not inconsistent with applicable state law and regulation. State chartered federally insured credit unions seeking to redeem secondary capital accounts must submit the request required by § 701.34(d)(1) to both the state supervisory authority and the NCUA Regional Director. The state supervisory authority must grant or deny the request with the concurrence of the appropriate NCUA Regional Director.

[FR Doc. 06–686 Filed 1–25–06; 8:45 am]

BILLING CODE 7535–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2005–20643; Airspace Docket No. 05–AAL–13]

Establishment of Class D Airspace; and Revision of Class E Airspace; Big Delta, Allen Army Airfield, Fort Greely, AK

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; correction.

SUMMARY: This action corrects an error in the airspace description contained in a Final Rule that was published in the **Federal Register** on Thursday, September 22, 2005 (70 FR 55531). Airspace Docket No. 05–AAL–13.

EFFECTIVE DATE: February 27, 2006.

FOR FURTHER INFORMATION CONTACT: Derril Bergt, AFSAO, Federal Aviation Administration, 222 West 7th Avenue, Box 14, Anchorage, AK 99513–7587; telephone number (907) 271–2796; fax: (907) 271–2850; e-mail: *derril.bergt@faa.gov.* Internet address: *http://www.alaska.faa.gov/at.*

SUPPLEMENTARY INFORMATION:

History

Federal Register Document FAA–2005–20643, FR Doc. 05–18931, published on Thursday, September 22, 2005 (70 FR 55531), established Class D airspace at Big Delta, Allen Army Airfield, AK. An error was discovered in the airspace description that misidentified a highway name in the description of an area excluded from the Class D Airspace. This action corrects that error.

Correction to Final Rule

Accordingly, pursuant to the authority delegated to me, the airspace description of the Class D airspace published in the **Federal Register**, Thursday, September 22, 2005 (70 FR 55531), (FR Doc 05–18931), page 55533, column 1) is corrected as follows:

§ 71.1 [Corrected]

* * * * *

AAL AK D Big Delta, AK [Corrected]

Big Delta, Allen AAF, AK
(Lat. 63°59′40″ N., long. 145°43′18″ W.)
Big Delta VORTAC
(Lat. 64°00′16″ N., long. 145°43′02″ W.)
Delta Junction Airport
(Lat. 64°03′02″ N., long. 145°43′02″ W.)

That airspace extending upward from the surface to and including 3,800 feet MSL within a 6.3-mile radius of the Allen AAF; excluding the portion within the boundary of

restricted area 2202A, and excluding that portion at and below 700 feet above ground level from a point one-half mile south of the Delta Junction Airport (D66) extending via the 090° bearing to 1 mile east of the Richardson Highway and via the 270 bearing to 1 mile west of the Delta River; thence northwest parallel to the Richardson Highway and the Delta River, to the boundary of Class D airspace.

* * * * *

Issued in Anchorage, AK, on January 13, 2006.

Anthony M. Wylie,

Manager, Safety, Area Flight Service Operations.

[FR Doc. 06–728 Filed 1–25–06; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2005–22855; Airspace Docket No. 05–AAL–35]

Establishment of Class E Airspace; Chignik, AK

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action creates Class E airspace at Chignik, AK to provide adequate controlled airspace to contain aircraft executing a new Standard Instrument Approach Procedure (SIAP) at the airport. This rule results in new Class E airspace upward from 700 ft. and 1,200 ft. above the surface at the Chignik Airport, Chignik AK.

EFFECTIVE DATE: 0901 UTC, April 13, 2006.

FOR FURTHER INFORMATION CONTACT: Gary Rolf, AAL–538G, Federal Aviation Administration, 222 West 7th Avenue, Box 14, Anchorage, AK 99513–7587; telephone number (907) 271–5898; fax: (907) 271–2850; e-mail: gary.ctr.rolf@faa.gov. Internet address: *http://www.alaska.faa.gov/at.*

SUPPLEMENTARY INFORMATION:

History

On Thursday, November 17, 2005, the FAA proposed to amend part 71 of the Federal Aviation Regulations (14 CFR part 71) to modify Class E airspace upward from 700 ft. and 1,200 ft. above the surface at Chignik, AK (70 FR 69711). The action was proposed in order to create Class E airspace sufficient in size to contain aircraft while executing one new SIAP for the Chignik Airport. The new approach is the Area Navigation (Global Positioning System) (RNAV (GPS)) Runway (RWY) 02, original. Class E controlled airspace extending upward from 700 ft. and 1,200 ft. above the surface in the Chignik Airport area is created by this action. The NPRM listed the runway designation incorrectly as runway 01. The correct runway designation is runway 02. Airspace more than 12 Nautical Miles (NM) from the shoreline will be excluded from this action. That controlled airspace outside 12 NM from the shoreline within 72.8 NM of the airport will be created in coordination with HQ FAA ATA–400 by modifying existing Offshore Airspace Areas in accordance with FAA Order 7400.2. That NPRM is currently published as Docket # FAA–2005–22024, 05–AL–38. Interested parties were invited to participate in this rulemaking proceeding by submitting written comments on the proposal to the FAA. No public comments have been received; thus the rule is adopted as proposed.

The area will be depicted on aeronautical charts for pilot reference. The coordinates for this airspace docket are based on North American Datum 83. The Class E airspace areas designated as 700/1,200 ft. transition areas are published in paragraph 6005 of FAA Order 7400.9N, *Airspace Designations and Reporting Points*, dated September 1, 2005, and effective September 15, 2005, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designation listed in this document will be published subsequently in the Order.

The Rule

This amendment to 14 CFR part 71 creates Class E airspace at Chignik, Alaska. This Class E airspace is created to accommodate aircraft executing one new SIAP and will be depicted on aeronautical charts for pilot reference. The intended effect of this rule is to provide adequate controlled airspace for Instrument Flight Rule (IFR) operations at Chignik Airport, Chignik, Alaska.

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore—(1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle 1, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority.

This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart 1, Section 40103, Sovereignty and use of airspace. Under that section, the FAA is charged with prescribing regulations to ensure the safe and efficient use of the navigable airspace. This regulation is within the scope of that authority because it creates Class E airspace sufficient in size to contain aircraft executing the instrument procedure for the Chignik Airport and represents the FAA's continuing effort to safely and efficiently use the navigable airspace.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

Adoption of the Amendment

■ In consideration of the foregoing, the Federal Aviation Administration amends 14 CFR part 71 as follows:

PART 71—DESIGNATION OF CLASS A, CLASS B, CLASS C, CLASS D, AND CLASS E AIRSPACE AREAS; AIRWAYS; ROUTES; AND REPORTING POINTS

■ 1. The authority citation for 14 CFR part 71 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of Federal Aviation Administration Order 7400.9N, *Airspace Designations and Reporting Points*, dated September 1, 2005, and effective September 15, 2005, is amended as follows:

* * * * *

Paragraph 6005 Class E airspace extending upward from 700 feet or more above the surface of the earth.

* * * * *

AAL AK E5 Chignik, AK [New]

Chignik Airport, AK
(Lat. 56°18′41″ N., long. 158°22′24″ W.)

That airspace extending upward from 700 feet above the surface within a 6.3-mile

radius of the Chignik Airport and that airspace extending upward from 1,200 feet above the surface within a 72.8-mile radius of the Chignik Airport, excluding that airspace more than 12 nautical miles from the shoreline.

* * * * *

Issued in Anchorage, AK, on January 13, 2006.

Anthony M. Wylie,

Manager, Safety, Area Flight Service Operations.

[FR Doc. 06–729 Filed 1–25–06; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2006–23545; Airspace Docket No. 06–ACE–1]

Modification of Class E Airspace; Gothenburg, Quinn Field, NE

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Direct final rule; request for comments.

SUMMARY: This action modifies the Class E airspace at Gothenburg Quinn Field, NE. The FAA has developed Area Navigation (RNAV) Global Positioning System (GPS) Standard Instrument Approach Procedures (SIAP) to Runways (RWY) 3 and 21 at Gothenburg, Quinn Field, NE. Additional controlled airspace extending upward from 700 feet Above Ground Level (AGL) is needed to accommodate the SIAPs.

The intended effect of this rule is to provide controlled Class E airspace for aircraft executing the SIAPs and to segregate aircraft using instrument approach procedures in instrument conditions from aircraft operating in visual conditions.

DATES: This direct final rule is effective on 0901 UTC, June 8, 2006. Comments for inclusion in the Rules Docket must be received on or before March 1, 2006.

ADDRESSES: Send comments on this proposal to the Docket Management System, U.S. Department of Transportation, Room Plaza 401, 400 Seventh Street, SW., Washington, DC 20590–0001. You must identify the docket number FAA–2006–23545/ Airspace Docket No. 06–ACE–1, at the beginning of your comments. You may also submit comments on the Internet at *http://dms.dot.gov.* You may review the public docket containing the proposal, any comments received, and any final disposition in person in the Dockets Office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Docket Office (telephone 1–800–647–5527) is on the plaza level of the Department of Transportation NASSIF Building at the above address.

FOR FURTHER INFORMATION CONTACT: Brenda Mumper, Air Traffic Division, Airspace Branch, ACE–520A, DOT Regional Headquarters Building, Federal Aviation Administration, 901 Locust, Kansas City, MO 64106; telephone: (816) 329–2524.

SUPPLEMENTARY INFORMATION: This amendment to 14 CFR part 71 modifies the Class E airspace beginning at 700 feet above the surface at Gothenburg, Quinn Field, NE to contain Instrument Flight Rule (IFR) operations in controlled airspace. The area will be depicted on appropriate aeronautical charts. Class E airspace areas are published in Paragraph 6005 of FAA Order 7400.9N, Airspace Designation and Reporting Points, dated September 1, 2005, and effective September 16, 2005, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designations listed in this document will be published subsequently in the Order.

The Direct Final Rule Procedure

The FAA anticipates that this regulation will not result in adverse or negative comment and, therefore, is issuing it as a direct final rule. Previous actions of this nature have not been controversial and have not resulted in adverse comments or objections. Unless a written adverse or negative comment, or a written notice of intent to submit an adverse or negative comment is received within the comment period, the regulation will become effective on the date specified above. After the close of the comment period, the FAA will publish a document in the **Federal Register** indicating that no adverse or negative comments were received and confirming the date on which the final rule will become effective. If the FAA does receive, within the comment period, an adverse or negative comment, or written notice of intent to submit such a comment, a document withdrawing the direct final rule will be published in the **Federal Register**, and a notice of proposed rulemaking may be published with a new comment period.

Comments Invited

Interested parties are invited to participate in this rulemaking by submitting such written data, views, or arguments, as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal. Communications should identify both docket numbers and be submitted in triplicate to the address listed above. Commenters wishing the FAA to acknowledge receipt of their comments on this notice must submit with those comments a self-addressed, stamped postcard on which the following statement is made: ''Comments to Docket No. FAA–2006–23545/Airspace Docket No. 06–ACE–1.'' The postcard will be date/time stamped and returned to the commenter.

Agency Findings

The regulations adopted herein will not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power responsibilities among the various levels of government. Therefore, it is determined that this final rule does not have federalism implications under Executive Order 13132.

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. Therefore, this regulation—(1) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 2579); and (3) does not warrant preparation of a Regulatory Evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

This rulemaking is promulgated under the authority described in subtitle VII, part A, subpart I, section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority since it contains aircraft executing instrument approach procedures to Gothenburg, Quinn Field, NE.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

Adoption of the Amendment

■ Accordingly, the Federal Aviation Administration amends 14 CFR part 71 as follows:

PART 71—DESIGNATION OF CLASS A, CLASS B, CLASS C, CLASS D, AND CLASS E AIRSPACE AREAS; AIRWAYS; ROUTES; AND REPORTING POINTS

■ 1. The authority citation for part 71 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40103, 40113, 40120; E.O. 10854, 25 FR 9565, 3 CFR, 2559–2563 Comp., p. 389.

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of Federal Aviation Administration Order 7400.9N, dated September 1, 2005, and effective September 16, 2005, is amended as follows:

Paragraph 6005 Class E airspace areas extending upward from 700 feet or more above the surface of the earth.

* * * * *

ACE NE E5 Gothenburg, NE

Gothenburg, Quinn Field, NE
(Lat. 40°55′35″ N., long. 100°08′54″ W.)

That airspace extending upward from 700 feet above the surface within an 8.4-mile radius of Quinn Field and within 4 miles each side of the 030° bearing from the airport extending from the 8.4-mile radius to 11.1 miles northeast of the airport, and within 4 miles each side of the 218° bearing from the airport extending from the 8.4-mile radius to 10.5 miles southwest of the airport.

* * * * *

Issued in Kansas City, MO, on January 10, 2006.

Paul J. Sheridan,

Area Director, Western Flight Services Operations.

[FR Doc. 06–725 Filed 1–25–06; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 97

[Docket No. 30475; Amdt. No. 3150]

Standard Instrument Approach Procedures, Weather Takeoff Minimums; Miscellaneous Amendments

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This amendment establishes, amends, suspends, or revokes Standard Instrument Approach Procedures (SIAPs) and/or Weather Takeoff Minimums for operations at certain airports. These regulatory actions are needed because of the adoption of new or revised criteria, or because of changes occurring in the National Airspace System, such as the commissioning of new navigational facilities, addition of new obstacles, or changes in air traffic requirements. These changes are designed to provide safe and efficient use of the navigable airspace and to promote safe flight operations under instrument flight rules at the affected airports.

DATES: This rule is effective January 26, 2006. The compliance date for each SIAP and/or Weather Takeoff Minimums is specified in the amendatory provisions.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the **Federal Register** as of January 26, 2006.

ADDRESSES: Availability of matters incorporated by reference in the amendment is as follows:

For Examination:

1. FAA Rules Docket, FAA Headquarters Building, 800 Independence Avenue, SW., Washington, DC 20591;

2. The FAA Regional Office of the region in which the affected airport is located;

3. The National Flight Procedures Office, 6500 South MacArthur Blvd., Oklahoma City, OK 73169 or,

4. The National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

For Purchase: Individual SIAP and Weather Takeoff Minimums copies may be obtained from:

1. FAA Public Inquiry Center (APA–200), FAA Headquarters Building, 800 Independence Avenue, SW., Washington, DC 20591; or

2. The FAA Regional Office of the region in which the affected airport is located.

By Subscription: Copies of all SIAPs and Weather Takeoff Minimums mailed once every 2 weeks, are for sale by the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402.

FOR FURTHER INFORMATION CONTACT: Donald P. Pate, Flight Procedure Standards Branch (AFS–420), Flight Technologies and Programs Division, Flight Standards Service, Federal Aviation Administration, Mike Monroney Aeronautical Center, 6500 South MacArthur Blvd. Oklahoma City, OK. 73169 (Mail Address: P.O. Box 25082 Oklahoma City, OK. 73125) telephone: (405) 954–4164.

SUPPLEMENTARY INFORMATION: This amendment to Title 14 of the Code of Federal Regulations, part 97 (14 CFR part 97), establishes, amends, suspends, or revokes SIAPs and/or Weather Takeoff Minimums. The complete regulatory description of each SIAP and/or Weather Takeoff Minimums is contained in official FAA form documents which are incorporated by reference in this amendment under 5 U.S.C. 552(a), 1 CFR part 51, and 14 CFR part 97.20. The applicable FAA Forms are identified as FAA Forms 8260–3, 8260–4, 8260–5 and 8260–15A. Materials incorporated by reference are available for examination or purchase as stated above.

The large number of SIAPs and/or Weather Takeoff Minimums, their complex nature, and the need for a special format make their verbatim publication in the **Federal Register** expensive and impractical. Further, airmen do not use the regulatory text of the SIAPs and/or Weather Takeoff Minimums but refer to their depiction on charts printed by publishers of aeronautical materials. Thus, the advantages of incorporation by reference are realized and publication of the complete description of each SIAP and/or Weather Takeoff Minimums contained in FAA form documents is unnecessary. The provisions of this amendment state the affected CFR sections, with the types and effective dates of the SIAPs and/or Weather Takeoff Minimums. This amendment also identifies the airport, its location, the procedure identification and the amendment number.

The Rule

This amendment to 14 CFR part 97 is effective upon publication of each separate SIAP and/or Weather Takeoff Minimums as contained in the transmittal. Some SIAP and/or Weather Takeoff Minimums amendments may have been previously issued by the FAA in a Flight Data Center (FDC) Notice to Airmen (NOTAM) as an emergency action of immediate flight safety relating directly to published aeronautical charts. The circumstances which created the need for some SIAP, and/or Weather Takeoff Minimums amendments may require making them effective in less than 30 days. For the remaining SIAPs and/or Weather

Takeoff Minimums, an effective date at least 30 days after publication is provided.

Further, the SIAPs and/or Weather Takeoff Minimums contained in this amendment are based on the criteria contained in the U.S. Standard for Terminal Instrument Procedures (TERPS). In developing these SIAPs and/or Weather Takeoff Minimums, the TERPS criteria were applied to the conditions existing or anticipated at the affected airports. Because of the close and immediate relationship between these SIAPs and/or Weather Takeoff Minimums and safety in air commerce, I find that notice and public procedure before adopting these SIAPs and/or Weather Takeoff Minimums are impracticable and contrary to the public interest and, where applicable, that good cause exists for making some SIAPs and/or Weather Takeoff Minimums effective in less than 30 days.

Conclusion

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore—(1) Is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. For the same reason, the FAA certifies that this amendment will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 97

Air Traffic Control, Airports, Incorporation by reference, and Navigation (Air).

Issued in Washington, DC on January 13, 2006.

James J. Ballough,

Director, Flight Standards Service.

Adoption of the Amendment

■ Accordingly, pursuant to the authority delegated to me, under Title 14, Code of Federal Regulations, part 97 (14 CFR part 97) is amended by establishing, amending, suspending, or revoking Standard Instrument Approach Procedures and Weather Takeoff Minimums effective at 0901 UTC on the dates specified, as follows:

PART 97—STANDARD INSTRUMENT APPROACH PROCEDURES

■ 1. The authority citation for part 97 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40103, 40106, 40113, 40114, 40120, 44502, 44514, 44701, 44719, 44721–44722.

■ 2. Part 97 is amended to read as follows:

** * * Effective 16 February 2006*

Chicago, IL, Chicago Midway Intl, RNAV (RNP) Y RWY 13C, Orig
Chicago, IL, Chicago Midway Intl, RNAV (RNP) Y RWY 22L, Orig
Kansas City, MO, Charles B. Wheeler Downtown, RNAV (GPS) RWY 3, Orig
Kansas City, MO, Charles B. Wheeler Downtown, RNAV (GPS) RWY 21, Orig
Kansas City, MO, Charles B. Wheeler Downtown, ILS OR LOC RWY 3, Amdt 2
Kansas City, MO, Charles B. Wheeler Downtown, VOR RWY 3, Amdt 17
Kansas City, MO, Charles B. Wheeler Downtown, VOR RWY 21, Amdt 13
Allentown, PA, Lehigh Valley International, ILS OR LOC/DME RWY 24, Orig
Allentown, PA, Lehigh Valley International, LOC BC RWY 24, Amdt 20A, CANCELLED
Lancaster, PA, Lancaster, ILS OR LOC RWY 8, Orig
Lancaster, PA, Lancaster, LOC RWY 8, Orig, CANCELLED

** * * Effective 13 April 2006*

Peru, IL, Illinois Valley Rgnl-Walter A. Duncan Field, RNAV (GPS) RWY 18, Orig
Peru, IL, Illinois Valley Rgnl-Walter A. Duncan Field, RNAV (GPS) RWY 36, Orig
Peru, IL, Illinois Valley Rgnl-Walter A. Duncan Field, LOC RWY 36, Amdt 3
Peru, IL, Illinois Valley Rgnl-Walter A. Duncan Field, Takeoff Minimums and Textual Departure Procedure, Orig
Greensburg, IN, Greensburg-Decatur County, RNAV (GPS) RWY 36, Orig
Greensburg, IN, Greensburg-Decatur County, VOR-A, Amdt 2B
Dickinson, ND, Dickinson-Theodore Roosevelt Regional, VOR-A, Amdt 6
Minot, ND, Minot Intl, RNAV (GPS) RWY 13, Amdt 1
Minot, ND, Minot Intl, RNAV (GPS) RWY 31, Amdt 1
Minot, ND, Minot Intl, ILS OR LOC RWY 31, Amdt 10
Minot, ND, Minot Intl, LOC/DME BC RWY 13, Amdt 8
Minot, ND, Minot Intl, Takeoff Minimums and Textual Departure Procedures, Amdt 3

The FAA published Amendments in Docket No. 30471 Amdt No. 3146 to Part 97 of the Federal Aviation Regulations (Vol 70, FR No. 247, page 76395, dated December 27, 2005) Under Section 97.29 effective 16 February 2006, which is hereby corrected to read as follows:

Ballinger, TX, Bruce Field, RNAV (GPS) RWY 35, Orig
Ballinger, TX, Bruce Field, GPS RWY 35, Orig, CANCELLED

The procedures were incorrectly published in TL 06–02 as follows

Ballinger, TX, Ballinger Field, RNAV (GPS) RWY 35, Orig
Ballinger, TX, Ballinger Field, GPS RWY 35, Orig, CANCELLED

[FR Doc. 06–739 Filed 1–25–06; 8:45 am]

BILLING CODE 4910–13–P

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 240

Trusts

CFR Correction

In Title 17 of the Code of Federal Regulations, Part 240 to end, on page 421, in § 240.16a–8 paragraphs (a)(1)(i), (ii), (A), and (B) are removed.

[FR Doc. 06–55503 Filed 1–25–06; 8:45 am]

BILLING CODE 1505–01–D

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 240

Schedule 14A—Information Required in Proxy Statement

CFR Correction

In Title 17 of the Code of Federal Regulations, part 240 to end, revised as of April 1, 2005, on page 216, in § 240.14a–101, Item 10, paragraph (c) and Instruction 1 to paragraph (c), is moved to the second column before the undesignated heading *Instructions*.

[FR Doc. 06–55504 Filed 1–25–06; 8:45 am]

BILLING CODE 1505–01–D

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Part 1c

[Docket No. RM06–3–000; Order No. 670]

Prohibition of Energy Market Manipulation

Issued January 19, 2006.

AGENCY: Federal Energy Regulatory Commission.

ACTION: Final rule.

SUMMARY: In this Final Rule, pursuant to Title III, Subtitle B, and Title XII, Subtitle G of the Energy Policy Act of 2005, the Federal Energy Regulatory Commission (Commission) is amending its regulations to implement new section 4A of the Natural Gas Act and new section 222 of the Federal Power

Act, prohibiting the employment of manipulative or deceptive devices or contrivances.

DATES: Effective Date: January 26, 2006.

FOR FURTHER INFORMATION CONTACT:
Mark Higgins, Office of Market Oversight and Investigations, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. (202) 502–8273. *Mark.Higgins@ferc.gov.*

Frank Karabetsos, Office of General Counsel, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. (202) 502–8133. Frank.Karabetsos@ferc.gov.

SUPPLEMENTARY INFORMATION:

Table of Contents

Before Commissioners: Joseph T. Kelliher, Chairman; Nora Mead Brownell, and Suedeen G. Kelly.

I. Introduction

1. On October 20, 2005, the Commission issued a Notice of Proposed Rulemaking (NOPR) to prohibit energy market manipulation.[1] Pursuant to section 4A of the Natural Gas Act (NGA)[2] and section 222 of the Federal Power Act (FPA),[3] as added to the statutes by the Energy Policy Act of 2005 (EPAct 2005),[4] the Commission proposed to add a Part 159 under Subchapter E and a Part 47 under Subchapter B to Title 18 of the *Code of Federal Regulations.* Under the proposed regulations, it would be

[1] Prohibition of Energy Market Manipulation, 113 FERC ¶ 61,067 (2005); 70 FR 61930, October 27, 2005.

[2] 15 U.S.C. 717 *et al.* (2000).

[3] 16 U.S.C. 791a *et al.* (2000).

[4] Energy Policy Act of 2005, Pub. L. No. 109–58, 119 Stat. 594 (2005), 315 and 1283, respectively.

unlawful for any entity, directly or indirectly, in connection with the purchase or sale of natural gas or the purchase or sale of transportation services subject to the jurisdiction of the Commission, or in connection with the purchase or sale of electric energy or the purchase or sale of transmission services subject to the jurisdiction of the Commission, (1) to use or employ any device, scheme, or artifice to defraud, (2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or (3) to engage in any act, practice, or course of business that operates or would operate as a fraud or deceit upon any person.

2. In the NOPR, the Commission stated that sections 315 and 1283 of EPAct 2005 ''apply to the conduct of 'any entity,' not just jurisdictional market-based rate sellers, natural gas pipelines, or holders of blanket certificate authority,'' and ''includes not only regulated utilities but also governmental utilities and other market participants.'' [5] Furthermore, we stated in the NOPR that sections 1c.1(a)(1)–(3) and 1c.2(a)(1)–(3) of the proposed regulations were patterned after the Securities and Exchange Commission's (SEC) Rule 10b–5,[6] and were ''intended to be interpreted consistent with analogous SEC precedent that is appropriate under the circumstances.'' [7] Sections 1c.1(b) and 1c.2(b) of the proposed regulations stated that nothing in these provisions should be construed to create a private right of action. The Commission further noted, however, that sections 1c.1(b) and 1c.2(b) were not intended to take away any other right that may otherwise exist.

3. Thirty parties filed comments and nine parties filed reply comments.[8] In response to the comments, and as discussed more fully below, the Commission, among other things: clarifies the scope of application of the final rule; addresses comments pertaining to disclosure and sections 1c.1(a)(2)–(3) and 1c.2(a)(2)–(3) of the final rule; discusses the elements of a violation of the final rule; notes the relationship of the final rule to the Market Behavior Rules [9]; and deals with a number of implementation issues, such as the applicable statute of limitations, affirmative defenses and safe harbor provisions, and procedural matters.

4. For the most part, the Commission finds it unnecessary to change the wording of the proposed regulatory text, except in one respect: substituting ''entity'' for ''person'' in sections 1c.1(a)(3) and 1c.2(a)(3) of the final rule. However, we do provide certain clarifications requested by several commenters. In addition, we find that some of the recommendations made by commenters are more appropriately addressed in the proceeding initiated in Docket No. RM06–5–000, proposing to repeal the codes of conduct for unbundled sales service and for persons holding blanket marketing certificates, and in Docket No. EL06–16–000, proposing to repeal the Market Behavior Rules, which are currently included in all public utility sellers' market-based rate tariffs and authorizations.[10]

5. Without a rule prohibiting manipulative or deceptive conduct, the language of EPAct 2005 sections 315 and 1283 does not, by itself, make any particular act unlawful. As a result, this final rule serves as the implementing provision designed to prohibit manipulation and fraud in the markets the Commission is charged with regulating. The final rule is not intended to regulate negligent practices or corporate mismanagement, but rather to deter or punish fraud in wholesale energy markets. In addition, to ease references to the final rule, we have determined to place the new regulations in a new Part 1c of the Commission's general regulations, rather than separately in new Parts 159 and 47 as proposed in the NOPR. The regulatory text of proposed sections 159.1 and 47.1 as identified herein will be new sections 1c.1 and 1c.2, respectively.

II. Background

6. On August 8, 2005, EPAct 2005 became law. Sections 315 and 1283 of EPAct 2005, amending the NGA and the FPA, respectively, are virtually identical, and prohibit the use or employment of manipulative or deceptive devices or contrivances in connection with the purchase or sale of natural gas, electric energy, or transportation or transmission services subject to the jurisdiction of the Commission. These anti-manipulation sections of EPAct 2005 closely track the prohibited conduct language in section 10(b) of the Securities Exchange Act of 1934,[11] and specifically dictate that the terms ''manipulative or deceptive device or contrivance'' are to be used ''as those terms are used in section 10(b) of the Securities Exchange Act of 1934.''

7. The SEC adopted Rule 10b–5,[12] which implemented section 10(b) of the Exchange Act. Since their promulgation, a significant body of legal precedent concerning section 10(b) of the Exchange Act and Rule 10b–5 has developed. Consistent with the mandate that certain aspects of the Commission's new authority be exercised in a manner consistent with section 10(b) of the Exchange Act, consistent with Congress' modeling sections 315 and 1283 of EPAct 2005 on section 10(b) of the Exchange Act, and as proposed in the NOPR, the Commission has modeled the final rule on Rule 10b–5. This approach will benefit entities subject to the new rule because there is a substantial body of precedent applying the comparable language of Rule 10b–5. In the course of responding to various comments, we will discuss the appropriate application of analogous securities law precedent that will inform the interpretation of the final rule in the context of the NGA and FPA.

III. Discussion

8. The 30 initial comments and nine reply comments on the NOPR are from a diverse group of industry stakeholders. Overwhelmingly, commenters are supportive of our efforts to implement well-developed, clear and fair rules aimed at eliminating the potential for fraud in wholesale energy transactions. The comments identify a number of issues: (1) The scope of application of the Final Rule; (2) the usefulness of securities law precedents to the energy industry; (3) the disclosure implications of the Final Rule; (4) the elements that comprise a violation of the Final Rule; (5) how the Final Rule will interact with the Market Behavior Rules; and (6) a variety of procedural matters, including the appropriate

[5] NOPR at 70 FR 61931.

[6] 17 CFR 240.10b–5 (2005).

[7] NOPR at 70 FR 61931. As explained in P 5, supra, the regulations proposed to be placed in new sections 159.1 and 47.1 will be new sections 1c.1 and 1c.2, respectively.

[8] Entities filing intervening and reply comments are listed in the Appendix to this final rule. The abbreviations for such commenters are noted in the Appendix. The Commission has accepted and considered all comments filed, including late-filed comments.

[9] *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, 105 FERC ¶ 61,218 (2003), *reh'g denied*, 107 FERC ¶ 61,175 (2004); Order No. 644, *Amendment to Blanket Sales Certificates*, 68 FR 66323 (2003), FERC Stats. & Regs. ¶ 31,153 (2003), *reh'g denied*, 107 FERC ¶ 61,174 (2004). The Market Behavior Rules are currently on appeal. *Cinergy Marketing & Trading, L.P.* v. *FERC*, Nos. 04–1168 *et al.* (DC Cir., appeal filed April 28, 2004).

[10] Amendments to Codes of Conduct for Unbundled Sales Service and for Persons Holding Blanket Marketing Certificates, 70 FR 72090 (2005), 113 FERC ¶ 61,189 (2005); Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations, 70 FR 71484 (2005), 113 FERC ¶ 61,190 (2005).

[11] Securities Exchange Act of 1934, 15 U.S.C. 78j(b) (2000) (Exchange Act).

[12] 17 CFR 240.10b–5 (2005).

statute of limitations to apply to the Final Rule. These issues and others that were raised in comments are addressed in the sections that follow.

A. Scope of Application of Regulations

1. Comments

9. Several commenters express views on the appropriate scope of the proposed anti-manipulation regulations.[13] Commenters ask the Commission to clarify the meaning of ''any entity'' and ''subject to the jurisdiction of the Commission'' as these statutory terms apply to the proposed regulations. For example, the Midwest ISO supports broad application of the proposed regulations to any entity as opposed to ''limiting the application of the regulations to FERC jurisdictional parties.'' [14] Likewise, NASUCA reads the proposed regulations as applying to all entities, ''not just jurisdictional market-based rate sellers, natural gas pipelines, or holders of blanket certificate authority.'' [15] AGA asks the Commission to clarify that ''any entity'' means that the proposed regulations extend beyond Order No. 644 regulation of jurisdictional market-based rate sellers, natural gas pipelines, or holders of blanket certificate authority. This is necessary, AGA asserts, to ensure the rules will have the ''intended effective impact on the market place for natural gas sales.'' [16]

10. Two commenters specifically address whether the proposed regulations apply to ''first sales'' [17] of natural gas. APGA, noting that first sales represent a substantial part of the wholesale natural gas market, argues that the phrase ''subject to the jurisdiction of the Commission'' in NGA section 4A must be read to apply only to ''the purchase or sale of transportation services'' and not to the preceding clause ''purchase or sale of natural gas.'' [18] SUEZ, however, argues that ''subject to the jurisdiction of the Commission'' applies to purchases and sales as well as to transportation services. SUEZ maintains that ''any entity'' does not include entities engaged in non-jurisdictional transactions such as first sales, sales of LNG, or retail sales, but is intended only to bring certain governmental entities otherwise excluded from FPA jurisdiction under the umbrella of the proposed regulations.[19]

11. APPA and NARUC also urge the Commission to construe the phrase ''subject to the Commission's jurisdiction'' to modify both the purchase or sale of electric energy and the purchase or sale of transmission services. By doing so, APPA and NARUC argue, the Commission will make clear the regulation does not apply to retail sales or purchases and thus will avoid overlap with state and local jurisdiction.[20] In reply comments, Cinergy argues that regardless of the parsing of the statutory language, the manipulation authority falls within the existing scope of the FPA and NGA, and that nothing in the scope of these statutes suggests that retail sales are in any way subject to the Commission's authority.[21] Likewise, EEI argues that the FPA is limited to wholesale markets, and that matters subject to state regulation are excluded from the reach of the Commission.[22]

12. NGSA asserts that EPAct 2005 does not open the door to regulation of non-jurisdictional sales even if they are subject to the anti-manipulation rules. NGSA acknowledges that the statutory provisions expand the Commission's authority to prevent market manipulation, but cautions that nothing in the statute grants the Commission any rate or certificate jurisdiction over deregulated first sales of natural gas.[23]

13. Other commenters address the meaning of ''any entity'' in the context of FPA sections 201(f) and 211A. PG&E argues that it is crucial that the Commission's authority to prohibit manipulation extend to all entities involved in the market. Noting the specific reference to entities described in FPA section 201(f), PG&E states that the proposed regulations should apply to all municipalities and other governmental agencies.[24] EEI also states that the proposed regulations must reach entities described in FPA section 201(f), including unregulated transmitting utilities under FPA section 211A. This is so, EEI argues, because the authority to require comparable open access transmission under FPA section 211A makes all transmission service provided by FPA section 201(f) entities subject to the jurisdiction of the Commission and thus subject to the proposed anti-manipulation rules.[25] APPA responds that under section 211A(c) certain entities are not subject to the transmission service requirements (those selling less than 4,000,000 MWhs per year, or that do not own facilities necessary to operate an interconnected transmission system, or that meet other criteria that the Commission may adopt in the future). These entities, APPA argues, are not subject to the jurisdiction of the Commission and thus not subject to the proposed regulations.[26] NRECA goes further, asserting that while FPA section 201(f) governmental entities are ''potentially'' subject to the proposed anti-manipulation regulations, the regulations can only apply to transactions that are otherwise subject to the Commission's jurisdiction. Thus, NRECA argues that neither party to a retail sale, to transmission service in intrastate commerce, or to a sale of electricity or transmission service by a FPA section 201(f) entity are subject to the proposed regulations.[27]

14. AOPL seeks clarification that ''subject to the jurisdiction of the Commission'' does not mean the Commission would subject oil pipelines to claims of market manipulation in connection with transportation and transmission services subject to the Commission's jurisdiction under the Interstate Commerce Act (ICA).[28]

15. Finally, Cinergy asks that the text of the proposed regulations be modified to make explicit that the regulations pertain only to market manipulation, noting that SEC Rule 10b–5 applies to a wide range of activities beyond market manipulation.[29]

2. Commission Determination

16. As an initial matter, this Final Rule does not, and is not intended to, expand the types of transactions subject to the Commission's jurisdiction under the FPA, NGA, NGPA, or ICA. As now explained, however, the new regulations do apply to ''any entity'' as that is the scope of the final rule as directed by sections 315 and 1283 of EPAct 2005. If

[13] *See, e.g.,* AGA at 4–5; APGA at 10; APPA at 3–4; AOPL at 2; BP at 1–2; Cinergy at 8; EEI at 25–26; Indicated Market Participants at 8; Midwest ISO at 4; NARUC Reply at 3–5; SCANA at 3; SUEZ at 6–11.

[14] Midwest ISO at 4.

[15] NASUCA at 3.

[16] AGA at 4.

[17] ''First sales'' are certain wholesale sales of natural gas removed from the Commission's jurisdiction by the Natural Gas Policy Act of 1978 (NGPA) and the Wellhead Decontrol Act of 1989. Accordingly, the only sales of natural gas that the Commission currently has jurisdiction to regulate are sales for resale of domestic gas by pipelines, local distribution companies (LDCs), or their affiliates so long as they do not produce the gas that they sell, and sales for resale of natural gas previously purchased and sold by an interstate pipeline, LDC or retail customer. *See Dan Diego Gas and Electric Company,* 101 FERC ¶ 61,161 at P 10 (2002); *Reporting of Natural Gas Sales to the California Market,* 96 FERC & 61,119 at 61,463, *reh'g denied,* 97 FERC ¶ 61,029 (2001).

[18] APGA at 3–10.

[19] SUEZ at 10, referring to FPA section 201(f) entities.

[20] APPA at 4; NARUC Reply at 3.5.

[21] Cinergy Reply at 2–4.

[22] EEI Reply at 6.

[23] NGSA at 3.

[24] PG&E at 6.

[25] EEI at 25.

[26] APPA Reply at 5–6.

[27] NRECA Reply at 2–5.

[28] AOPL at 1–3.

[29] Cinergy at 8.

any entity engages in manipulation and the conduct is found to be ''in connection with'' a jurisdictional transaction, the entity is subject to the Commission's anti-manipulation authority. Absent such nexus to a jurisdictional transaction, however, fraud and manipulation in a non-jurisdictional transaction (such as a first or retail sale) is not subject to the new regulations.

17. NGA section 4A and FPA section 222 make it unlawful for ''any entity'' to use a manipulative or deceptive device or contrivance ''in connection with'' the purchase or sale of natural gas or electric energy or the purchase or sale of transportation or transmission services ''subject to the jurisdiction of the Commission.'' [30] The answer to the scope of application of the final rule lies in a reasonable reading of these terms in relation to each other.

18. ''Any entity'' is a deliberately inclusive term. Congress could have used the existing defined terms in the NGA and FPA of ''person,'' ''natural-gas company,'' or ''electric utility,'' but instead chose to use a broader term without providing a specific definition.[31] Thus, the Commission interprets ''any entity'' to include any person or form of organization, regardless of its legal status, function or activities.[32]

19. The second aspect of the analysis focuses on the transaction involved. A transaction under NGA section 4A is ''the purchase or sale of natural gas or the purchase or sale of transportation services subject to the jurisdiction of the Commission.'' A transaction under FPA section 222 is ''the purchase or sale of electric energy or the purchase or sale of transmission services subject to the jurisdiction of the Commission.'' The critical issue is whether the limiting phrase of ''subject to the jurisdiction of the Commission'' applies to both preceding phrases, that is, (1) the purchase or sale of the energy commodity and (2) transportation services or transmission services, or just to the transportation or transmission services. APGA argues that the ''rule of the last antecedent'' means that it should only modify the last phrase, that is, transportation services or transmission services. But in the absence of definitive punctuation or other clearer expression of intent to limit the jurisdiction requirement only to transportation or transmission, the Commission must look for the meaning which is the most reasonable under the circumstances.[33]

20. The Commission concludes that the phrase ''subject to the jurisdiction of the Commission'' should be read as modifying both preceding phrases, that is, ''the purchase or sale'' as well as ''transportation services'' (NGA) and ''transmission services'' (FPA). Had Congress intended to expand the Commission's jurisdiction so significantly as to give it anti-manipulation authority over such transactions as first sales of imported natural gas, intrastate sales of electric energy, retail sales of electric energy or energy sales by governmental entities, we believe it would have done so explicitly.[34] Further, in light of the close link between transportation or transmission services and natural gas and electric commodity sales, we do not believe that Congress would have expanded the Commission's authority to cover all natural gas and electric commodity sales but not all gas transportation and electric transmission. Accordingly, we conclude that the most reasonable interpretation is that Congress did not expand the Commission's traditional NGA and FPA subject matter jurisdiction in sections 315 or 1283 of EPAct, but rather gave the Commission broad jurisdiction over the entities that engage in certain conduct affecting our subject matter jurisdiction.

21. Third, the phrase ''in connection with'' must be given meaning. APGA says that interpreting ''subject to the jurisdiction of the Commission'' as applying to sales effectively would exclude producers and marketers from the reach of the final rule as these are the dominant sellers of natural gas in wholesale markets. APGA argues this interpretation implies that enactment of NGA section 4A serves no purpose, as it does not increase the Commission's reach beyond the rules already promulgated by Order No. 644.[35] This is not the case, however. As discussed below, any entity may be subject to the final rule if its fraudulent or manipulative conduct is ''in connection with'' a purchase or sale of natural gas, electric energy, transportation service, or transmission service that is subject to the Commission's jurisdiction.[36] Thus,

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[30] The text of EPAct 2005 section 315, adding section 4A to the NGA, is:

It shall be unlawful for any entity, directly or indirectly, to use or employ, in connection with the purchase or sale of natural gas or the purchase or sale of transportation services subject to the jurisdiction of the Commission, any manipulative or deceptive device or contrivance (as those terms are used in section 10(b) of the Securities Exchange Act of 1934 (15 U.S.C. 78j(b))) in contravention of such rules and regulations as the Commission may prescribe as necessary in the public interest or for the protection of natural gas ratepayers. Nothing in this section shall be construed to create a private right of action.

The corresponding text of EPAct 2005 section 1283, adding section 222 to the FPA, is:

(a) **In general**.—It shall be unlawful for any entity (including an entity described in section 201(f)), directly or indirectly, to use or employ, in connection with the purchase or sale of electric energy or the purchase or sale of transmission services subject to the jurisdiction of the Commission, any manipulative or deceptive device or contrivance (as those terms are used in section 10(b) of the Securities Exchange Act of 1934 (15 U.S.C. 78j(b))), in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of electric ratepayers.

(b) **No Private Right of Action**.—Nothing in this section shall be construed to create a private right of action.

[31] *See* NGA sections 2(1) and 2(6); FPA sections 3(4) and 3(22). Congress did note that entities described in FPA section 201(f) are included in the meaning of entity. *See* FPA section 222(a).

[32] Because many entities that are engaged in wholesale natural gas or electricity transactions or in interstate transportation or transmission services, engage in both jurisdictional and non-jurisdictional transactions, it is not enough to say, as SUEZ suggests, that entities engaging in non-jurisdictional transactions are not covered.

[33] APGA at 4 (*citing 2a N. Singer, Sutherland on Statutory Construction* § 47:33 at 369 (6th rev. ed. 2000) and *Barnhart* v. *Thomas,* 540 U.S. 20, 26 (1993)). The general rule is that a qualifying phrase will normally apply to the provision or clause immediately preceding it. However, ''where the sense of the entire act requires that a qualifying word or phrase apply to several preceding * * * sections, the word or phrase will not be restricted to its immediate antecedent.'' *Sutherland* § 47:33 at 372. The case referred to by APGA also notes that the rule is ''not an absolute'' and ''can assuredly be overcome by other indicia of meaning.'' *Barnhart* v. *Thomas,* 540 U.S. at 26.

[34] Transactions not subject to the Commission's jurisdiction include first sales, sales of imported natural gas, sales of imported LNG, sales and transportation by NGA section 1(b)–(d) entities (*i.e.*, activities including production and gathering, local distribution, ''Hinshaw'' pipelines, and vehicular natural gas), or by NGA section 7(f) companies, retail sales of electric energy, sales of electric energy in intrastate commerce, sales of electric energy by governmental entities and certain electric power cooperatives, and certain interstate transmission by governmental entities.

[35] APGA at 6–8. APGA also points to EPAct 2005 section 318, which adds a new section (d) to NGA section 20. Section 20(d) authorizes the Commission to seek a court order barring an individual found to have engaged in manipulation from future energy transactions; there is a similar new provision in FPA section 314(d). Here, APGA argues, Congress used subparts to separate sales from transportation service, and applied the ''subject to the jurisdiction of the Commission'' only to the latter. This is not dispositive. First, this is a separate section of the statute. Second, the use of subparts does not conclusively mean that ''subject to the jurisdiction of the Commission'' cannot also modify the first subpart. Third, the reading APGA urges still presents the troublesome prospect that parties could assert that the anti-manipulation authority now applies to retail sales or other transactions otherwise expressly excluded from the Commission's jurisdiction.

[36] AEP urges that the final rule identify the modalities through which an entity is prohibited from manipulating a market, noting that SEC Rule 10b–5 specifies that fraud or manipulation must involve the ''use of any means or instrumentality of interstate commerce or of the mails, of any facility of any national securities exchange.'' AEP at 2. This is not necessary, as manipulation must

the third aspect of the analysis is to consider whether the fraud is ''in connection with'' a jurisdictional transaction.

22. Section 10(b)'s ''in connection with'' requirement has been construed broadly by the Supreme Court to encompass many circumstances where securities transactions ''coincide'' with the overall scheme to defraud.[37] However, the Supreme Court was careful to state that section 10(b) ''must not be construed so broadly as to convert every common law fraud that happens to involve securities into a violation'' of section 10(b) and Rule 10b–5.[38] Guided by this precedent, the Commission views the ''in connection with'' element in the energy context as encompassing situations in which there is a nexus between the fraudulent conduct of an entity and a jurisdictional transaction. We note that, unlike the SEC, which has broad jurisdiction over securities transactions, our jurisdiction is limited to certain wholesale transactions that remain within the ambit of the NGA, NGPA, and FPA. At the same time, energy markets are made up of both jurisdictional and non-jurisdictional transactions. We do not intend to construe the Final Rule so broadly as to convert every common-law fraud that happens to touch a jurisdictional transaction into a violation of the final rule. Rather, in committing fraud, the entity must have intended to affect, or have acted recklessly to affect, a jurisdictional transaction.[39] For example, any entity engaging in a non-jurisdictional transaction through a Commission-regulated RTO/ISO market, that acts with intent or with recklessness to affect the single price auction clearing price (which sets the price of both non-jurisdictional and jurisdictional transactions), would be engaging in fraudulent conduct in connection with a jurisdictional transaction and, therefore, would be in violation of the final rule.

23. Turning to the comments that address the applicability of the proposed regulations to FPA sections 201(f) and 211A,[40] here too the focus must be on the transaction and the entity's conduct to determine whether a violation of the final rule occurred. Again, the Commission emphasizes that if *any* entity engages in fraudulent conduct and that conduct is in connection with a jurisdictional transaction, then the final rule is applicable to that entity. It is, therefore, not necessary for the Commission to determine in this context how sections 201(f) and 211A are to be applied generally.[41]

24. With respect to the request by AOPL for clarification on whether ''subject to the jurisdiction of the Commission'' would cause oil pipelines to be subject to claims of market manipulation in connection with transportation services subject to the Commission's jurisdiction under the ICA, the Commission points out that EPAct 2005 did not amend the ICA to include anti-manipulation provisions, and therefore we do not read the authority granted under the NGA and FPA to proscribe and penalize fraud or deceit as applying to oil pipeline transportation under the ICA.

25. As to Cinergy's request that the text of the final rule be modified to make explicit that the regulations apply only to market manipulation, we decline to do so. Cinergy's request would unduly narrow the broad authority Congress granted in EPAct 2005. The language of EPAct 2005 sections 315 and 1283 is modeled after section 10(b) of the Exchange Act, which has been interpreted as a broad anti-fraud ''catch-all clause.'' [42] SEC Rule 10b–5, on which the final rule is patterned, does not expressly limit itself to manipulation, but uses terms such as ''device, scheme, or artifice to defraud'' and ''fraud or deceit.'' [43] We will retain similar language in our final rule, which will permit the Commission to police all forms of fraud and manipulation that affect natural gas and electric energy transactions and activities the Commission is charged with protecting.

B. General Applicability of Securities Law Concepts

1. Comments

26. Commenters are divided as to whether we should model the proposed anti-manipulation regulations after SEC Rule 10b–5. Ameren, Cinergy, EPSA, Indicated Market Participants, EEI, LG&E, NGSA, PNM and Xcel argue that adoption of a rule patterned on SEC Rule 10b–5 is problematic because the securities model is one of disclosure, designed in large part to protect novice investors by eliminating disparities in access to information, whereas the purpose of the FPA and NGA is to ensure ''just and reasonable'' rates in wholesale energy markets. Many of the commenters also argue that the participants in energy markets are largely sophisticated, and unlike less-sophisticated participants in the securities markets, do not need the protections of a disclosure regime.[44]

27. AGA comments that it is unclear how the SEC's model of disclosure will apply to natural gas market transactions, and ISDA and PNM argue that the Commission should refrain from a wholesale adoption of SEC case law as such an action would create uncertainty as to the duties, standards and obligations owed by market participants because of the different regulatory frameworks for energy and securities markets.[45] EPSA, PG&E and SUEZ call for further study and tailoring of Rule 10b–5 to the energy industry because of the differences between the operations of the securities markets and the energy markets.[46] FirstEnergy argues that the

be in connection with jurisdictional transactions which, by definitions in NGA section 1(b) and FPA section 201(b), are in interstate commerce.

[37] *SEC* v. *Zandford*, 535 U.S. 813, 825 (2002) (''[T]he SEC complaint describes a fraudulent scheme in which the securities transaction and breaches of fiduciary duty coincide. Those breaches were therefore 'in connection with' securities sales within the meaning of [section] 10(b).''). *See also Superintendent of Insurance* v. *Bankers Life & Casualty Co.*, 404 U.S. 6, 12–13 (1971) (previously the Supreme Court had stated that the requirement was met when there was an ''injury as a result of deceptive practices touching [the] sale of securities''); *Head* v. *Head*, 759 F.2d 1172, 1175 (4th Cir. 1985) (the nexus must be more than a *de minimis* ''touch,'' yet is applied flexibly where there is fraud affecting securities transactions).

[38] *SEC* v. *Zandford*, 535 U.S. at 820.

[39] See PP 52–53 *infra* for a discussion of the intent required for a violation of the final rule.

[40] *See, e.g.*, APPA Reply at 5–6; EEI at 25; PG&E at 6; NRECA Reply at 2–5.

[41] Section 211A permits the Commission to issue regulations to implement the provisions of FPA section 211A. At this time, the Commission has not proposed such regulations, but has included this issue in the Notice of Inquiry issued in *Preventing Undue Discrimination and Preference in Transmission Service*, 70 FR 55796 (2005), FERC Stats. & Regs. ¶ 35,553 (2005). Full delineation of the scope of FPA section 211A should be developed through that proceeding, not in the context of the anti-manipulation regulations.

[42] *See Aaron* v. *SEC*, 446 U.S. 680, 690 (1980); *see also Schreiber* v. *Burlington Northern, Inc.*, 472 U.S. 1, 6–7 (1985) (describing section 10(b) as a ''general prohibition of practices * * * artificially affecting market activity in order to mislead investors * * *.''); *Affiliated Ute Citizens of Utah* v. *United States*, 406 U.S. 128, 151–53 (1972) (noting that the repeated use of the word ''any'' in section 10(b) and SEC Rule 10b–5 denotes a congressional intent to have the provisions apply to a wide range of practices).

[43] 17 CFR 240.10b–5 (2005). SEC Rule 10b–5 is titled ''Employment of manipulative and deceptive devices.''

[44] Ameren at 3–4; Cinergy at 6–7; EPSA at 5–8; Indicated Market Participants at 10–13; EEI at 6–8; LG&E at 3–7; NGSA at 4–5; PNM Reply at 4–5; Xcel at 3–6.

[45] AGA at 4; ISDA at 3–5; PNM Reply at 4–6. But not everyone dismisses the importance of the regulations to sophisticated parties. APPA shares SCE's observation that the degree of ''protection'' implied by relative levels of counterparty sophistication must not be overstated, noting that even sophisticated market participants may need protection against market manipulations. APPA Reply at 3–4; SCE at 3–4.

[46] EPSA at 11; PG&E at 12; SUEZ at 14.

rules proposed in the NOPR are vague and overly broad.[47]

28. On the other hand, APGA, NARUC, NASCUA, NJBPU, and the States support the Commission's decision to model the proposed regulations on SEC Rule 10b–5.[48] APPA, NARUC and NJBPU argue that Rule 10b–5 case law will provide useful guidance as the Commission develops its own body of precedent to follow.[49] TDUS argues that the Commission's proposed rule prohibiting market manipulation plainly implements, in a straightforward manner, the express intent of EPAct 2005.[50] TDUS finds the arguments of Ameren and Xcel unpersuasive because parties as sophisticated as they purport to be ought to have no problem complying with a straightforward prohibition against making fraudulent representations in their transactions.[51] TDUS also argues that the level of sophistication of the parties to a bilateral negotiation is irrelevant because the Commission's anti-manipulation rules are not to protect the contracting parties from each other, but to protect the consumers who rely on the market for their energy supplies.[52]

29. APPA and INGAA support the Commission's reliance on section 10(b) of the Exchange Act and SEC Rule 10b–5, and the case law interpreting the statute and rule, as providing guidance to the Commission in administering its new EPAct 2005 anti-manipulation authority.[53] APPA and INGAA also recommend that the Commission take into account pertinent differences between the regulatory regimes of the Exchange Act and the NGA and NGPA, and depart from securities law precedent when industry structure and common sense so dictate.[54]

2. Commission Determination

30. As a general matter, the Commission does not believe that modeling the Final Rule on SEC Rule 10b–5 is problematic or will create uncertainty. This is not to say that commenters did not raise valid concerns about how securities precedent will be applied in the energy industry context. We intend to adapt analogous securities precedents as appropriate to specific facts, circumstances, and situations that arise in the energy industry. This is consistent with Congress' modeling of EPAct 2005 sections 315 and 1283 on section 10(b) of the Exchange Act and explicit references to section 10(b) in EPAct 2005 sections 315 and 1283, and will provide a level of substantial certainty with respect to how the regulations will operate that the Commission is not typically able to provide where a preexisting body of law and precedent is not readily available. The Commission likewise finds that modeling the final rule on SEC Rule 10b–5 provides clarity to affected parties similar to the clarity provided by Congress. Thus, the Commission rejects FirstEnergy's argument that the proposed regulations are vague and overly broad. As previously stated, the Final Rule is modeled on SEC Rule 10b–5, which is not vague or overly broad.[55]

31. The Commission rejects EPSA's, PG&E's and SUEZ's calls for further study and tailoring of Rule 10b–5 to the industry the Commission regulates. Further study and tailoring would not improve the final rule or industry understanding of its scope and applicability. While the Commission generally agrees with commenters that a wholesale overlay of the securities laws onto energy markets is overly simplistic, we also believe it would be illogical to simply ignore decades of useful guidance that securities law precedent can offer, especially considering that Congress deliberately modeled EPAct 2005 sections 315 and 1283 on section 10(b) of the Exchange Act. Therefore, the Commission intends to recognize, on a case-by-case basis, that the roles of the Commission and the SEC are not identical in determining whether it is appropriate to adopt securities precedents to specific energy industry facts, circumstances, or situations.[56]

32. The Commission recognizes that the SEC does not have a duty to assure that the price of a security is just and reasonable, and that our duty is not to protect purchasers through a regime of disclosure. Despite these differences in mission, however, wholesale natural gas and power markets, like securities markets, are susceptible to fraud and market manipulation, regardless of the level of sophistication of the market participants. Therefore, it is appropriate to model the final rule on SEC Rule 10b–5 in an effort to prevent (and where appropriate remedy) fraud and manipulation affecting the markets the Commission is entrusted to protect, while providing a level of certainty to market participants that is beyond that which the Commission would be otherwise required to provide. However, as discussed below, we provide several of the clarifications requested by the commenters to address the differences between the SEC's regulation of securities markets and our regulation of markets for natural gas and electricity.

C. Disclosure

33. Several commenters expressed concern over what they consider to be disclosure implications of the proposed regulations.[57] In particular, commenters focused on two disclosure-related areas: Whether the proposed anti-manipulation regulations create a new duty of disclosure; and whether sections 1c.1(a)(2) and 1c.2(a)(2), and particularly the references to ''omissions of material fact,'' impose an undue burden on bilateral, arm's-length negotiations.

1. Duty of Disclosure

a. Comments

34. Commenters' view is that the proposed regulations should not create an affirmative duty to disclose strategic or proprietary information not otherwise required under the FPA, NGA, or Commission orders, rules, or regulations.[58] Ameren argues that there is no evidence in EPAct 2005 that Congress intended to impose a general obligation of disclosure in the energy markets.[59] Ameren and LG&E provide examples of a company purchasing power as a result of a forced outage, and question whether, under the regulations, a party would have to disclose information detrimental to its bargaining position.[60] AEP expresses similar concern that the regulations should not require companies to disclose trade secrets, sensitive information, or forward looking information developed by the company.[61] AEP argues that the proposed rules be clarified to

[47] FirstEnergy at 4–6.

[48] APGA at 4–5; NARUC at 4–5; NASCUA at 2–3; NJBPU at 2–3; States at 2. APGA, NARUC, and the States argue that modeling the final rule on SEC Rule 10b–5 is consistent with the express congressional dictates of EPAct 2005.

[49] APPA Reply at 1–2; NARUC at 5; NJPBU at 3.

[50] TDUS at 2–3.

[51] *Id.* at 3.

[52] *Id.* at 3–4.

[53] APPA Reply at 1–3; INGAA at 7.

[54] APPA Reply at 1; INGAA at 5.

[55] *See, e.g., United States* v. *Persky*, 520 F.2d 283 (2d Cir. 1975); *accord Todd & Co.* v. *SEC*, 557 F.2d 1008, 1013 (3d Cir. 1977).

[56] For example, as explained in paragraph 36 *supra*, the Commission is not adopting the disclosure regime of the SEC, and as explained in paragraphs 52–53 *infra*, the element of scienter will apply in the Final Rule just as it applies to SEC Rule 10b–5.

[57] *See, e.g.*, Ameren at 4–6; AGA at 4; AEP at 2; Cinergy at 8–9; Indicated Market Participants at 10–13, 23–28; EEI at 14–16; EPSA at 5–11; FirstEnergy at 10–13; ISDA at 3–8; INGAA at 5–7, 10; LG&E at 9; NGSA at 2, 5–6; PG&E at 7; Progress at 2–4; SCE at 3–4; SUEZ at 12–14; Xcel at 2, 4–6.

[58] *See, e.g.*, Ameren at 4; EEI at 16; Indicated Market Participants at 27.

[59] Ameren at 4.

[60] *Id.* at 5; LG&E at 8.

[61] AEP at 2.

encompass only those instances where there is an affirmative duty to disclose, such as a Commission-imposed disclosure or reporting requirement.[62] EPSA and Progress argue that the regulations should be clarified so as not to result in broad disclosure obligations that would be incompatible with the arm's-length transactions that the Commission oversees.[63] Similarly, INGAA and EEI argue that the regulations should be revised to delete or limit any affirmative obligation to disclose information to a counterparty, or to educate another party in bilateral negotiations.[64] In support of its argument, INGAA cites SEC Regulation D, which exempts certain securities offerings from the registration and disclosure requirements of the securities laws because the investors in such offerings are sophisticated.[65] NGSA also states that the Commission should clarify that it does not intend to incorporate by reference the disclosure obligations applicable to issuers of securities.[66]

b. Commission Determination

35. The Commission declines to modify the proposed regulations in this final rule. To avoid uncertainty, however, we clarify that the final rule creates no new affirmative duty of disclosure. Commenters are mistaken to the extent they believe section 10(b) of the Exchange Act or SEC Rule 10b–5 imposes an independent affirmative obligation to disclose. Well-settled case law interpreting section 10(b) and Rule 10b–5 makes clear that section 10(b) and Rule 10b–5 do not, by themselves, create an affirmative duty to disclose absent a relationship of trust and confidence (*i.e.*, a fiduciary relationship) or some other duty imposed elsewhere in the securities laws.[67] Therefore, in the arm's-length, bilateral negotiations that are typical in wholesale energy markets, absent some tariff requirement or Commission directive mandating disclosure, the final rule imposes no new affirmative duty of disclosure.

36. As there is no new affirmative duty of disclosure under the final rule, commenters' concern over the disclosure implications of the proposed regulations is misplaced. The final rule operates within the regulatory framework of the FPA and NGA; the Commission is not adopting the disclosure provisions of the securities laws[68] or the purpose of the securities laws, which is ''to protect investors by promoting full disclosure of information thought necessary to informed investment decisions.''[69] Rather, the final rule, like section 10(b) of the Exchange Act and SEC Rule 10b–5, is an anti-fraud provision, not a disclosure provision.[70] Nothing in the final rule requires disclosure of sensitive information that would only function to weaken an entity's bargaining position in arm's-length, bilateral negotiations. Absent a tariff requirement or Commission directive mandating disclosure, there is no violation of the final rule simply because an entity chooses not to disclose all non-public information in its possession.[71]

37. Similarly, the Commission clarifies that nothing in the final rule changes the Commission's precedent on contract law. Private contracts are fundamental to the functioning of the energy industry, and the Commission expects parties to continue to rely on the contracts they enter into. The Commission expects parties to continue to resolve most contract disputes, including those based on claims of fraud in the inducement, without the involvement of the Commission, relying on State and Federal courts to apply contract law as appropriate.

2. Sections 1c.1(a)(2) and 1c.2(a)(2) and Omissions of Material Fact

a. Comments

38. Commenters are divided as to whether the Commission should modify or delete sections 1c.1(a)(2) and 1c.2(a)(2) of the final rule, particularly with regard to sections 1c.1(a)(2) and 1c.2(a)(2)'s references to omissions.[72] Ameren, Cinergy, and Indicated Market Participants argue that sections 1c.1(a)(2) and 1c.2(a)(2) should not be adopted because the definition of market manipulation should not include any general duty to disclose.[73] More specifically, EEI and EPSA argue that reference in sections 1c.1(a)(2) and 1c.2(a)(2) to ''omissions of material fact'' should be deleted as it would require market participants to disclose sensitive information that would not otherwise be exchanged among wholesale energy market participants engaged in bilateral negotiations, which could result in harm to the market participant's bargaining position.[74] EEI also argues that sections 1c.1(a)(2) and 1c.2(a)(2) should be modified to incorporate a knowledge and intent standard.[75]

39. FirstEnergy argues that sections 1c.1(a)(2) and 1c.2(a)(2) are overly broad, and unnecessary to protect electric ratepayers because participants in wholesale power sales transactions are sophisticated and have the ability to evaluate the veracity of any information that may be conveyed by other participants.[76] Indicated Market Participants argue that since the disclosure concepts of the securities laws are not generally applicable to electric and gas markets, sections 1c.1(a)(2) and 1c.2(a)(2) should be deleted.[77] Likewise, Xcel argues that there is no need to require SEC-like disclosure in wholesale energy markets, and it argues that the Commission should modify or delete sections 1c.1(a)(2) and 1c.2(a)(2).[78] While not asking for a change in the regulations, INGAA requests that we clarify that ''mere puffery'' is not actionable under the regulations.[79]

40. On the other hand, APGA, PNM and TDUS support the inclusion of

[62] *Id.* at 3.

[63] EPSA at 1; Progress at 2–4.

[64] INGAA at 7; EEI at 16. *See also* ISDA Supplemental Reply at 2.

[65] INGAA at 5.

[66] NGSA at 2, 5–6.

[67] *See Basic Inc.* v. *Levinson*, 485 U.S. 224, 239, n.17 (1988) (''Silence, absent a duty to disclose, is not misleading under Rule 10b–5.'') *citing Chiarella* v. *United States*, 445 U.S. 222, 234 (1980) (''* * * a duty to disclose under [section] 10(b) does not arise from the mere possession of nonpublic market information. [T]he duty to disclose arises when [there exists] a relationship of trust and confidence * * * .''); *see also Gross* v. *Summa Four*, 93 F.3d 987, 992 (1st Cir. 1996) (citing *Chiarella*, the court holds that ''[b]y itself * * * Rule 10b–5[] does not create an affirmative duty of disclosure. Indeed, a corporation does not commit securities fraud merely by failing to disclose all nonpublic material information in its possession.''); *accord Castellano* v. *Young & Rubicam, Inc.*, 257 F.3d 171, 179 (2d Cir. 2002); *Ackerman* v. *Schwartz*, 947 F.2d 841, 848 (7th Cir. 1991).

[68] *See, e.g.*, 15 U.S.C. 78m (2000).

[69] *SEC* v. *Ralston Purina Co.*, 346 U.S. 119, 123–5 (1953).

[70] *See, e.g., International Brotherhood of Teamsters* v. *Daniel*, 439 U.S. 551, 565 n.18 (1979) (distinguishing between the disclosure and antifraud provisions of the securities laws, the court states that a waiver from disclosure requirements because an investor is sophisticated does ''not provide shelter from the criminal anti-fraud protection of Rule 10b–5 or other civil anti-fraud provisions); *Sonnenfeld* v. *City of Denver*, 100 F.3d 744, 746 n.1 (10th Cir. 1996) (noting that securities exempted from regulatory burdens are still subject to civil fraud causes of action).

[71] *See supra* note 67.

[72] Sections 1c.1(a)(2) and 1c.2(a)(2) read: ''to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading * * * .''

[73] Ameren at 6; Cinergy at 8; Indicated Market Participants at 28.

[74] EEI at 16; EPSA at 8.

[75] EEI at 16.

[76] FirstEnergy at 11.

[77] Indicated Market Participants at 27–28.

[78] Xcel at 2, 4–6.

[79] INGAA at 9.

sections 1c.1(a)(2) and 1c.2(a)(2) without modification.[80] APGA urges the Commission to reject calls for the deletion or modification of sections 1c.1(a)(2) and 1c.2(a)(2) because the vast bulk of natural gas sales are not negotiated by sophisticated market participants, but are determined by price indices that rely on full and accurate reporting.[81] PNM supports the inclusion of sections 1c.1(a)(2) and 1c.2(a)(2) noting that there may be rare instances where an omission of material fact amounts to market manipulation, but also notes that the Commission should make clear that the sections create no new duty of disclosure.[82]

b. Commission Determination

41. The Commission rejects proposals to modify or delete sections 1c.1(a)(2) and 1c.2(a)(2) of the regulations. As just discussed, the final rule does not create an affirmative duty to disclose beyond any existing requirements. It is important to note, however, that where an entity voluntarily provides information or where the entity is required by a tariff or a Commission statute, order, rule or regulation to provide information, and the entity then misrepresents or omits a material fact such that the information provided is materially misleading, there can be a violation of the final rule if all of the other elements of a violation are present.[83] This does not mean, however, that a material misrepresentation or omission that affects only negotiations between two sophisticated parties will necessarily result in an enforcement action by the Commission. Instead, the Commission will decide whether to pursue enforcement action in such a situation on a case-by-case basis, with due consideration of whether such material misrepresentations or omissions occur in or have an effect on jurisdictional transactions. Absent such an effect, as we noted earlier, we generally will not apply the final rule to bilateral contract negotiations.

42. With respect to other comments related to the application of specific securities law precedent, as discussed earlier, the Commission intends, on a case-by-case basis, to be guided by analogous securities law precedent that is appropriate under the specific facts, circumstances, and situations in the energy industry. For example, even if some duty to provide information exists, the Commission agrees with INGAA that ''mere puffery'' is not violation of sections 1c.1(a)(2) and 1c.2(a)(2).[84]

D. Sections 1c.1(a)(3) and 1c.2(a)(3) and Intent

1. Comments

43. Some commenters suggested the Commission delete sections 1c.1(a)(3) and 1c.2(a)(3) of the proposed regulations or revise them explicitly to include the element of intent. For example, Ameren argues that sections 1c.1(a)(3) and 1c.2(a)(3) are unnecessary in light of sections 1c.1(a)(1) and 1c.2(a)(1).[85] EEI argues that sections 1c.1(a)(3) and 1c.2(a)(3) should be deleted because the ''operates as a fraud'' language could prohibit any deceptive act regardless of whether scienter is present.[86] Alternatively, EEI and FirstEnergy suggest that sections 1c.1(a)(3) and 1c.2(a)(3) be revised. EEI urges that sections 1c.1(a)(3) and 1c.2(a)(3) include elements of knowledge and intent; FirstEnergy also asks that the phrase ''or would operate'' be removed so it would be clear that actions not intended to defraud from being subject to the regulations.[87]

44. In contrast, TDUS argues that the Commission should reject attempts to modify or delete sections 1c.1(a)(3) and 1c.2(a)(3) noting that SEC Rule 10b–5 has remained intact since 1951, and no court or SEC action has resulted in any change to Rule 10b–5.[88] APGA also opposes modification or deletion of sections 1c.1(a)(3) and 1c.2(a)(3), arguing that intent is already an element of a violation of the proposed regulations, and any elimination of sections 1c.1(a)(3) and 1c.2(a)(3) could create uncertainty by distinguishing the final rule from SEC Rule 10b–5 so as to render analogous securities law precedent inapplicable.[89]

2. Commission Determination

45. The Commission rejects proposals to modify or delete sections 1c.1(a)(3) and 1c.2(a)(3) beyond the substitution of ''entity'' in place of ''person'' as discussed below in paragraph 76. Sections 1c.1(a)(3) and 1c.2(a)(3) are necessary; and as discussed below, there can be no violation of the final rule, or any of its sections, absent a showing of the requisite scienter. SEC Rule 10b–5 has an analogous section that has remained unchanged since it was adopted in 1942, and there is abundant securities law precedent that highlights the ongoing relevance of that section.[90] Therefore, as the final rule is modeled on SEC Rule 10b–5 and the Commission intends to be guided, on a case-by-case basis, by analogous securities law precedent that is appropriate under the facts, circumstances, and situations presented in the energy industry, it is prudent to retain sections 1c.1(a)(3) and 1c.2(a)(3) without modification.

E. Elements of a Manipulation Claim

1. Comments

46. Several commenters asked the Commission to clarify the elements of manipulation under the Final Rule.[91] INGAA recommends that the Commission explicitly reference the essential elements of the SEC's Rule 10b–5 cause of action that have been developed in the case law and provide greater guidance as to their application in the context of the natural gas markets.[92] Specifically, INGAA argues the Commission should clarify the definition of materiality, the requirement of scienter, the requirement of deception, the existence of a pre-existing duty to speak in a nondisclosure case, the absence of liability for mere puffery and other limitations.[93] Indicated Market Participants and NGSA state that the Commission should set forth the following as elements of a manipulation claim: Misrepresentation or omission of

[80] APGA at 5; PNM at 9; TDUS at 3–4.

[81] APGA at 5.

[82] PNM at 9. As discussed above in paragraph 28, TDUS argues that no dilution or alteration of the proposed rules is warranted, regardless of the sophistication of the parties to a transaction. TDUS at 3–4.

[83] These include the requisite scienter, discussed *infra*, and the conduct being in connection with a jurisdictional purchase or sale or jurisdictional transportation or transmission, discussed *supra*.

[84] *See In re Advanta Corp. Sec. Litig.*, 180 F.3d 525, 538 (3rd Cir. 1999) (noting that general expressions of optimism for the future are immaterial and not actionable); *Eisenstadt* v. *Centel Corp.*, 113 F.3d 738, 745 (7th Cir. 1997) (''*Everybody* knows that someone trying to sell something is going to look and talk on the bright side. You don't sell a product by bad-mouthing it. And everybody knows that auctions can be disappointing.'') (emphasis in original); *Raab* v. *General Physics Corp.*, 4 F.3d 286, 287 (4th Cir. 1996) (holding that predictions of future business prospects were not specific guarantees necessary to make them material within the meaning of section 10b); *see also In re Northern Telecom Ltd. Securities Litig.*, 116 F. Supp. 2d 446, 466 (S.D.N.Y 2000) (stating that under section 10b and Rule 10b–5, actionable statements must be sufficiently ''concrete'' or ''specific'' to be material, as opposed to ''single, vague statement[s] that are essentially mere puffery'').

[85] Ameren at 6–7.

[86] EEI at 13–14.

[87] *Id.* 14; FirstEnergy at 15.

[88] TDUS Reply at 8–9.

[89] APGA Reply at 5.

[90] One measure of the paragraph's importance is the frequency of use. There are numerous cases citing the ''operate as a fraud'' language of SEC Rule 10b–5, which suggest that it is not nugatory as EEI argues in its comments. *See, e.g., SEC* v. *Zandford*, 535 U.S. at 819; *SEC* v. *George*, 426 F.3d 786, 792 (2005).

[91] *See, e.g.*, Ameren at 6–7; AEP at 3; Cinergy at 7–8; Indicated Market Participants at 9–10, 18; EEI at 12–14; FirstEnergy at 7–10; INGAA at 7–11; LG&E at 3; NGSA at 2, 5–8; NiSource at 3, 5–8; Progress at 2–3; SCE at 4.

[92] INGAA at 7–8.

[93] *Id.* at 11.

a material fact; scienter, causation, reliance, and damages.[94]

47. EEI seeks clarification that fraud is a required element of the final rule and its sections.[95] AEP and EEI suggest that the Commission should explicitly identify the intent standard based on the scienter standard used in section 10(b), which is satisfied by a showing of recklessness.[96] EEI seeks clarification that liability under the market manipulation rule requires a showing of ''extreme recklessness'' or ''egregious disregard.'' [97] Progress believes that the final rule should be revised to exclude ''indirectly'' from sections 1c.1(a) and 1c.2(a), and if the Commission is unwilling to do so, it should explicitly incorporate an intent standard.[98] In contrast, TDUS argues that the Commission should not modify the regulations to incorporate a specific standard of intent into the final rule.[99]

2. Commission Determination

48. The Commission generally agrees that clarification of the elements of a violation under the final rule would reduce regulatory uncertainty and thereby assure greater compliance. It is unnecessary, however, to modify the text of the final rule. Rather, we will clarify the general requirements of a violation, guided by applicable securities law precedent, specifically the precedent setting out the elements the SEC must prove when it brings an enforcement action, as INGAA noted in its comments.[100] In enforcement actions under Rule 10b–5, the SEC must show that the defendant: (1) Made a material misrepresentation or a material omission as to which he had a duty to speak, or used a fraudulent device; (2) with scienter; and (3) in connection with the purchase or sale of securities.[101] The SEC does not need to show reliance, loss causation or damages because ''the Commission's duty is to enforce the remedial and preventive terms of the statute in the public interest, and not merely to police those whose plain violations have already caused demonstrable loss or injury.'' [102]

49. These elements offer useful guidance as to how the Commission will apply the final rule. The Commission will act in cases where an entity: (1) Uses a fraudulent device, scheme or artifice, or makes a material misrepresentation or a material omission as to which there is a duty to speak under a Commission-filed tariff, Commission order, rule or regulation, or engages in any act, practice, or course of business that operates or would operate as a fraud or deceit upon any entity; (2) with the requisite scienter; (3) in connection with the purchase or sale of natural gas or electric energy or transportation of natural gas or transmission of electric energy subject to the jurisdiction of the Commission. In the paragraphs that follow, the Commission offers clarification on each element.

50. The final rule prohibits the use or employment of any device, scheme, or artifice to defraud. The Commission defines fraud generally, that is, to include any action, transaction, or conspiracy for the purpose of impairing, obstructing or defeating a well-functioning market.[103] Fraud is a question of fact that is to be determined by all the circumstances of a case.

51. If there is a duty to disclose under a Commission-filed tariff or Commission directive, material misrepresentations and, under certain conditions, material omissions, may violate the final rule. Guided by securities law precedent, the Commission finds that a fact is material if there is a substantial likelihood that a reasonable market participant would consider it in making its decision to transact because the material fact significantly altered the total mix of information available.[104] Of course, not every fact about a transaction is material and, therefore, the materiality of a misrepresented or omitted fact will be determined on a case-by-case basis.[105]

52. The Commission rejects as unnecessary commenters' requests to incorporate a specific intent standard into the final rule. Congress directed that the terms ''manipulative or deceptive device or contrivance'' as they appear in sections 1283 and 315 of EPAct 2005 be interpreted in accordance with section 10(b) of the Exchange Act. According to the Supreme Court, ''[t]he words 'manipulative or deceptive' used in conjunction with 'device or contrivance' strongly suggest that § 10 (b) was intended to proscribe knowing or intentional misconduct * * * conduct designed to deceive or defraud investors by controlling or artificially affecting the price of securities.'' [106] Based on the foregoing, any violation of the final rule requires a showing of scienter.[107]

53. Commenters sought clarification on whether recklessness satisfies the scienter element. The Supreme Court has not addressed whether recklessness satisfies the scienter requirement it read into section 10(b),[108] but the Courts of

[94] Indicated Market Participants at 18; NGSA at 2, 5–7.

[95] EEI at 4.

[96] *Id.* at 12; AEP at 3.

[97] EEI at 12.

[98] Progress at 2–3.

[99] TDUS at 5.

[100] INGAA at 10–11. *See, e.g., SEC* v. *Monarch Funding Corp.*, 192 F.3d 295, 308 (2d Cir. 1999) (setting out the elements of an enforcement action under SEC Rule 10b–5). We reject the comments of Indicated Market Participants and NGSA, which set forth the elements of a private right of action under section 10(b) and Rule 10b–5. While cases arising in the context of private litigation may be instructive on certain points, the elements needed for a private right of action are not the same as those required for administrative enforcement applicable here.

[101] *SEC* v. *Monarch Funding Corp.*, 192 F.3d at 308.

[102] *See, e.g., SEC* v. *Credit Bancorp, Ltd.*, 195 F. Supp. 2d 475, 491 (S.D.N.Y. 2002) *quoting Berko* v. *SEC*, 316 F.2d 137, 143 (2d Cir. 1963) *citing SEC* v. *North American Research & Dev. Corp.*, 424 F.2d 63, 84 (2d Cir. 1970) (reliance not an element of a Rule 10b–5 claim in the context of an SEC proceeding). Similarly, in a criminal prosecution for securities fraud, the government need not demonstrate specific reliance by the investor in a securities fraud prosecution. *See United States* v. *Ashdown*, 509 F.2d 793, 799 (5th Cir. 1975). However, the government must show ''impact of the scheme on the investor.'' *See United States* v. *Schaefer*, 299 F.2d 625, 629 (7th Cir. 1962). While reliance, loss causation and damages are not necessary for a violation of the final rule, these elements will inform the Commission's assessment of any disgorgement or civil penalties that may be appropriate under the circumstances.

[103] *See e.g., Dennis* v. *United States*, 384 U.S. 855, 861 (1966) (noting that fraud within the meaning of a statute need not be confined to the common law definition of fraud: any false statement, misrepresentation or deceit).

[104] *TSC Industries, Inc.* v. *Northway, Inc.*, 426 U.S. 438 (1976) sets forth the ''total mix'' or ''substantial likelihood'' test of materiality: a substantial likelihood that the disclosure of the omitted fact would have been viewed by a reasonable investor as having significantly altered the total mix of information made available. *Accord Basic, Inc.* v. *Levinson*, 485 U.S. 224, 231–2 (1988).

[105] Based on securities law precedent, the relevant time period for determining materiality is at the time of the statement or omission, and not in hindsight. *See Ganino* v. *Citizens Utils. Co.*, 228 F.3d 154, 165 (2d Cir. 2000).

[106] *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 197 (1976) (*Hochfelder*); *accord Aaron* v. *SEC*, 446 U.S. 680, 690 (1980) (*Aaron*).

[107] *See Aaron*, 446 U.S. at 690, 705 (stating that the words ''manipulative,'' ''device,'' and ''contrivance'' whether given ''their commonly accepted meaning or read as terms of art'' clearly refers to ''knowing or intentional misconduct.'' In addition, the Court said that ''Section 10(b) is described as a catchall provision, but what it catches must be fraud.''); *Hochfelder*, 425 U.S. at 199 (noting that the words ''manipulative,'' ''device,'' and ''contrivance'' are ''terms that make unmistakable a congressional intent to proscribe a type of conduct quite different from negligence''). Despite section 10(b)'s use of the disjunctive ''or'' in ''manipulative or deceptive device or contrivance,'' the Supreme Court has concluded that both require ''misrepresentation.''

[108] *Hochfelder*, 425 U.S. at 194 n.12 (''In certain areas of the law recklessness is considered to be a form of intentional conduct for purposes of imposing liability for some act. We need not address here the question whether, in some circumstances, reckless behavior is sufficient for civil liability under [section] 10(b) and Rule 10b–5.''). Although the scienter requirement was first read into section 10(b) in the context of a private right of action, in *Aaron* the Supreme Court decided

Continued

Appeals that have addressed the issue agree that recklessness satisfies the section 10(b) scienter requirement.[109] Similarly, the Commission concludes that recklessness satisfies the scienter element of the final rule.

54. For our discussion of the ''in connection with'' requirement, see paragraphs 21 and 22, *supra*.

F. Interplay With Market Behavior Rules

1. Comments

55. Several commenters raise concerns over the interplay between the proposed regulations and the Market Behavior Rules.[110] Some commenters advocate that the Commission retain Market Behavior Rules, either as they are currently written or with modification.[111] Several industry commenters request deletion of the foreseeability standard and ''legitimate business purpose'' criteria of Market Behavior Rule 2, and incorporation of the scienter standard of the proposed regulations. Certain commenters also find the specific prohibitions of Market Behavior Rules 2(a) (wash trades), 2(b) (false information), 2(c) (artificial congestion/relief), and 2(d) (collusion) useful because those rules offer guidance and specificity about the prohibition of certain defined transactions.

56. APPA argues that the Commission should deal with the future of the Market Behavior Rules in the Commission's separate FPA 206 proceeding and not as part of this proceeding.[112] PNM, in contrast, contends that adopting rules based on SEC Rule 10b–5 will be confusing, and instead urges the Commission to amend the existing Market Behavior Rules to incorporate the terms of EPAct 2005 sections 315 and 1283, and not adopt the proposed regulations.[113]

57. EEI urges the Commission to retain the time limits and specific acts set forth in the Market Behavior Rules, and to state that compliance with the behavior rules guidelines constitutes compliance with the new rules.[114] Similarly, EEI argues that whatever the interaction between the Market Behavior Rules and the Final Rule, the Commission should clarify that there will be no ''double jeopardy.'' [115]

2. Commission Determination

58. Both Market Behavior Rules 2 and 3 [116] and this final rule prohibit fraud and manipulative conduct. The Market Behavior Rules are still in effect, although the Commission has indicated in the Market Behavior Rules proceeding (Docket Nos. EL06–16–000 and RM06–5–000) that the Market Behavior Rules may be revised or repealed after the anti-manipulation regulations are made effective.[117] If they are repealed, the Commission intends to have a smooth transition from the Market Behavior Rules to the final rule on manipulation, and there will be no gap in our prohibition of manipulation as we complete the transition.

59. As stated in the NOPR, the Commission will not seek duplicative sanctions for the same conduct in the event that conduct violates both the Market Behavior Rules and this final rule.[118] With respect to the specific prohibitions of Market Behavior Rule 2 (wash trades, transactions predicated on submitting false information, transactions creating and relieving artificial congestion, and collusion for the purpose of market manipulation), these are examples of prohibited manipulation, all of which are manipulative or deceptive devices or contrivances, and are therefore prohibited activities under this Final Rule, subject to punitive and remedial action.[119] Further, as discussed further below, the specific provision set forth in the Market Behavior Rules for actions taken in conformity with the Commission-approved market rules adopted by an ISO or RTO identify behaviors that are presumptively not fraudulent and hence would not be violations of this final rule.

60. The issue of applying the time limits set forth in the Market Behavior Rules to this final rule will be dealt with below.

G. Statute of Limitations

1. Comments

61. Some commenters urged the Commission to adopt an explicit statute of limitations period for the proposed rules.[120] For example, NiSource cites the Sarbanes-Oxley Act in support of its argument that the Commission require actions under the final rule be commenced within two years of discovery of a violation, but in no event more than five years after occurrence of a violation.[121] AEP cites a private rights of action under SEC Rule 10b–5 in support of its argument for three-year limitations period, and EEI argues the Commission should follow the five-year statute of limitations contained in 28 U.S.C. 2462 and adopt the 90-day provision of the Market Behavior Rules to require that an action must be filed within 90 days after the end of the calendar quarter in which the alleged violation of the final rule occurred or, if later, 90 days after the complainant knew or should have known that the alleged violation of the final rule occurred.[122]

2. Commission Determination

62. There is no explicit statute of limitations set forth in NGA section 4A or in FPA section 222, and no statute of

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that a showing of scienter is also required in SEC civil enforcement actions arising under section 10(b). *Aaron*, 446 U.S. at 695.

[109] Courts of appeal are in general agreement that that recklessness in some form satisfies the scienter requirement of SEC Rule 10b–5. For example, motive and opportunity to commit fraud or conscious behavior sufficient to raise a strong inference of recklessness is sufficient in the Second, Third, and Eighth Circuits. *See, e.g., Florida State Board of Administration* v. *Green Tree Fin. Corp.*, 270 F.3d 645 (8th Cir. 2001); *Novak* v. *Kasaks*, 216 F.3d 300 (2d Cir. 2000); *In re Advanta Corp. Securities Litig.*, 180 F.3d 525 (3d Cir. 1999). The First, Fifth, Sixth, Tenth and Eleventh Circuits apply a ''severely reckless'' or action with ''conscious disregard'' of the problem or risk standard. *See, e.g., Nathenson* v. *Zonagen, Inc.*, 267 F.3d 400 (5th Cir. 2001); *City of Philadelphia* v. *Fleming Companies, Inc.*, 264 F.3d 1245 (10th Cir. 2001); *Grebel* v. *FTP Software, Inc.*, 194 F.3d 185 (1st Cir. 1999); *In re Comshare, Inc. Securities Litig.*, 183 F.3d 543 (6th Cir. 1999); *Bryant* v. *Avardo Brands, Inc.*, 187 F.3d 1271 (11th Cir. 1999). In the Ninth Circuit, a plaintiff must plead ''in great detail facts that constitute strong circumstantial evidence of deliberately reckless or conscious misconduct.'' *See, e.g., In re Silicon Graphics Securities Litig.*, 183 F.3d 970 (9th Cir. 1999) (adopting the definition of recklessness as it appears in *Sundstrand Corp.* v. *Sun Chemical Corp.*, 553 F.2d 1033 (7th Cir. 1977), *cert. denied*, 434 U.S. 875 (1977)).

[110] *See, e.g.*, Ameren at 8–9; AGA at 5; Cinergy at 5, 9; EEI at 17–19; LG&E at 9; NARUC at 6; NASUCA at 4–5 (arguing for an expansion of the Market Behavior Rules to reach all market participants); PG&E at 4, 12–13; APPA Reply at 5; PNM Reply at 7–8; EEI Reply at 4–6.

[111] We note that, as a result of the timing of the comment due date in this proceeding, these comments were filed the same day as the Commission issued its orders proposing repeal of the Market Behavior Rules. *See Amendments to Codes of Conduct for Unbundled Sales Service and for Persons Holding Blanket Marketing Certificates*, 113 FERC ¶ 61,189 (2005); *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, 113 FERC ¶ 61,190 (2005).

[112] APPA Reply at 5.

[113] PNM Reply at 7–8.

[114] EEI Reply at 4–6.

[115] EEI at 21.

[116] The following analysis with regard to the Market Behavior Rules also applies to sections 284.288(a) and 284.403(a) of the Commission's codes of conduct with respect to certain sales of natural gas. 18 CFR 284.288(a) and 284.403(a) (2005).

[117] *See Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, 70 FR 71484 (2005), 113 FERC ¶ 61,190 at P 13 (2005); *Amendments to Codes of Conduct for Unbundled Sales Service and for Persons Holding Blanket Marketing Certificates*, 70 FR 72090 (2005), 113 FERC ¶ 61,189 at P 11 (2005).

[118] *See Prohibition of Energy Market Manipulation*, 113 FERC ¶ 61,067 at P 15 (2005).

[119] *See* 113 FERC ¶ 61,190 at P 18 (2005); 113 FERC ¶ 61,189 at P 15 (2005).

[120] *See, e.g.*, AEP at 3; EEI at 19–21; NGSA at 2, 5, 8; NiSource at 9.

[121] NiSource at 3.

[122] AEP at 3; EEI at 19–20.

limitations of general applicability appears in the NGA or FPA. The Commission declines to designate a statute of limitations or otherwise adopt an arbitrary time limitation on complaints or enforcement actions that may arise under NGA section 4A and FPA section 222. We note, however, that when a statutory provision under which civil penalties may be imposed lacks its own statute of limitations, the general statute of limitations for collection of civil penalties, 28 U.S.C. 2462, applies.[123] Section 2462 in 28 U.S.C. imposes a five-year limitations period on any ''action, suit, or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise.''[124]

63. The Commission, therefore, rejects AEP's call for a three-year limitations period because that period applies only in the context of private rights of action under the securities laws, not to SEC enforcement actions. For the same reason, we reject NiSource's argument that a limitations period under the Sarbanes-Oxley Act should apply to actions we may bring under our enforcement authority, and EEI's request that the Commission apply to the final rule the 90-day action limitation of the existing Market Behavior Rules. We will exercise prosecutorial discretion in determining whether to pursue an alleged violation based on all the facts presented, including the time elapsed since the violation is alleged to have occurred, and will adhere to the five-year statute of limitations where we seek civil penalties.

H. Safe Harbors and Affirmative Defenses

1. Comments

64. Several commenters suggest that the Commission make explicit in the language of proposed regulations certain safe harbors. For example, they argue that the following should be deemed acceptable behavior: Actions or transactions taken at the direction of an RTO or ISO (similar to the affirmative defense in Market Behavior Rule 2), compliance with Midwest ISO's market monitoring program, actions or transactions with a ''legitimate business purpose,'' and legitimate hedging activity.[125]

65. Some commenters urge the Commission to provide specific examples of what would or would not constitute market manipulation.[126] NiSource argues that aiding and abetting, as opposed to primary violations, and actions taken pursuant to Commission-approved tariffs, state law, and Supreme Court precedent, as well as minor errors, would not violate the proposed rules.[127] Furthermore, some commenters request a mechanism for obtaining guidance on whether proposed conduct violates the anti-manipulation rules through a procedure similar to the SEC's No-Action Letter process.[128]

2. Commission Determination

66. The Commission will address issues relating to the Market Behavior Rules, and the affirmative defenses or safe harbors therein, in the FPA section 206 proceeding and NGA NOPR related to the Market Behavior Rules in Docket Nos. EL06–16–000 and RM06–5–000. As noted in that proceeding, it is the Commission's intent to have a smooth transition to the new anti-manipulation regulations but not to leave gaps between the adoption of the final rule and any repeal or revision of the Market Behavior Rules.

67. In all events, however, it is not necessary to change the wording of the final rule. The availability of safe harbor presumptions of compliance and affirmative defenses will be the same as is currently the case under the Market Behavior Rules. Thus, if a market participant undertakes an action or transaction that is explicitly contemplated in Commission-approved rules and regulations, we will presume that the market participant is not in violation of the final rule. If a market participant undertakes an action or transaction at the direction of an ISO or RTO that is not approved by the Commission, the market participant can assert this as a defense for the action taken.

I. Procedures for Handling Manipulation Claims

1. Comments

68. Some commenters seek clarification on how claims of market manipulation will be processed by the Commission. PG&E asks for procedures that will permit involvement of affected market participants in manipulation complaints, including intervention and full participation by affected parties, and availability of all remedies, including disgorgement or returning consumers to the condition they would have been in, absent manipulation. Doing so, PG&E asserts, would provide due process for those damaged by manipulation and would assure that the Commission considers all relevant factors in resolving the complaint.[129] Cinergy, on the other hand, states that it expects that complaints would be filed pursuant to NGA section 5 or FPA section 206, and that the Commission should incorporate in the final rule procedural requirements for filing complaints. Cinergy also seeks clarification on whether the Commission intends to apply the proposed regulations retroactively in any manner.[130] At the same time, however, Cinergy also argues that the Commission should explicitly urge parties first to take concerns and potential complaints to the Office of Market Oversight and Investigations Enforcement Hotline (Hotline). This, Cinergy explains, would permit entities accused of manipulation to present facts and evidence without suffering the potential harm within industry and the investment community that could result from an accusation of manipulation, and could lead to faster settlement resolutions of manipulation claims.[131]

69. EEI and INGAA also urge the Commission to address the formal process and procedures to be used in resolving manipulation complaints, including the burden of proof.[132] INGAA and ISDA suggest the Commission adopt a ''Wells submission'' process like that of the SEC in which an entity[133] is given, at the end of an investigation, notice of the proposed charges and enforcement action that staff intends to recommend to the SEC, and an opportunity to submit a written statement and

[123] *See, e.g., United States* v. *Godbout-Bandal*, 232 F.3d 637, 639 (8th Cir. 2000).

[124] 28 U.S.C. 2462 (2000). The five-year limitation runs ''from the date the claim first accrued.'' *Id.* We intend that any administrative action for violation of the final rule be commenced within five years of the date of the fraudulent or deceptive conduct.

[125] *See, e.g.*, AEP at 2; AGA at 5–6 (advocating a safe harbor for ''inadvertent'' errors); Ameren at 7; DTE at 2–4; INGAA at 11; LG&E at 3; NGSA at 2, 5, 8–9 (seeking clarification that the proposed regulations do not modify or supersede the Commission's policy statement on price reporting or the related safe harbor provisions of that policy); NiSource at 7; and SCANA at 3–4.

[126] *See, e.g.*, SCANA at 3–5 (arguing for an explicit safe harbor for hedging transactions, and that any violation of the ''shipper must have title'' rule is a *per se* violation); NiSource at 7; and Indicated Market Participants at 20–22 (requesting specific guidance, including a non-exclusive list, of what would and would not be considered manipulative conduct, to aid in internal training and compliance programs).

[127] NiSource at 6–9.

[128] *See, e.g.*, First Energy at 15–16; INGAA at 11.

[129] PG&E at 14–15.

[130] Cinergy at 10.

[131] *Id.* at 10–12.

[132] EEI at 19–21; INGAA at 13.

[133] The ''Wells submission'' process is set forth in SEC regulations, 17 CFR 202.5(c) (2005).

materials to refute staff's recommendation.[134]

2. Commission Determination

70. Congress enacted the statutory prohibitions on market manipulation as separate sections of the NGA and FPA, giving the Commission anti-manipulation authority that is independent of other provisions of the NGA and FPA, including NGA section 5 and FPA section 206. Accordingly, the Commission rejects Cinergy's suggestion that complaints alleging manipulation necessarily would rely on NGA section 5 or FPA section 206.[135] As to the procedures to be followed when a complaint alleging manipulation is filed, the Commission will process the filing under the procedures currently set forth in Rule 206 of the Rules of Practice and Procedure.[136] The Commission rejects as unnecessary EEI's, INGAA's, and Cinergy's suggestions that we incorporate procedures into the final rule. The requirements for filing complaints are set out in Rule 206, and the process for handling complaints, including the allocation of the burden of proof, is well-defined through Commission case law. There is no need for a special or separate set of procedures for complaints arising from our new anti-manipulation authority.

71. Cinergy states that the industry needs to understand if there is to be any retroactive application of the final rule. The regulations adopted herein will become effective upon publication in the **Federal Register**. There can be no violation of the final rule until it is effective. The Market Behavior Rules, however, have been in effect since December 2003, and will remain in effect pending the outcome of the separate Docket Nos. EL06–16–000 and RM06–5–000 proceedings.

72. To the extent Cinergy suggests that no retroactive remedies should be used, the Commission reiterates that a complaint that alleges market manipulation will proceed under NGA section 4A or FPA section 222, utilizing the procedural rules and mechanisms generally applicable to NGA and FPA proceedings. We reject any suggestion that the Commission cannot remedy manipulative conduct after it has occurred, such as by ordering the disgorgement of profits and/or imposing a civil penalty. Congress did not limit the Commission's jurisdiction under NGA section 4A or FPA section 222 to prospective conduct and associated remedies only. How the Commission addresses market manipulation will depend on the facts presented, but we have significant discretion to shape equitable remedies that achieve the purpose of Congress' enactment of anti-manipulation provisions.[137] In devising a remedy, the Commission will exercise discretion to arrive at an appropriate remedy [138] and will explore all equitable considerations and practical consequences of our action pursuant to our statutory delegation.[139]

73. The Commission also declines to accept Cinergy's suggestion that we explicitly urge parties first to bring concerns and potential complaints to the Hotline.[140] Aggrieved entities should be free to choose the approach best suited to their circumstances, and if an entity so chooses, the Hotline (or other informal contact with the Commission's staff) is available for such matters.

74. Turning to INGAA's suggestion that the Commission adopt what is referred to as a ''Wells submission'' to permit entities under investigation to submit material to refute staff findings and recommendations prior to Commission action, we find that no new process need be adopted here. The Commission already has a regulation in place that provides a company under investigation with an opportunity to present its views,[141] and staff's existing practice is to present the company's views to the Commission as part of any report or recommendation made by staff following an investigation.

J. Miscellaneous Issues

1. Use of ''Entity'' in place of ''Person'' in sections 1c.1(a)(3) and 1c.2(a)(3)

a. Comments

75. Two commenters express concern with the use of ''person'' in proposed sections 47.1(a)(3) and 159.1(a)(3) and urge the Commission to substitute ''entity'' for ''person.'' [142] Specifically, APPA points out that under proposed section 47.1(a)(3), it is unlawful ''to engage in any act, practice, or course of business that operates or would operate as a fraud or deceit upon any *person*'' (emphasis added) and that the definition of ''person'' under the FPA excludes municipalities. Thus, according to APPA, an entity that practices a ''fraud or deceit'' on a municipality could argue that proposed section 47.1(a)(3) does not apply because the victim is not a ''person'' under the FPA.[143] APGA makes a similar argument with respect to proposed section 159.1(a)(3).[144]

b. Commission Determination

76. The Commission agrees with these commenters. It would be unfair and unintended to prohibit fraudulent or manipulative behavior by any entity, including municipalities, but then not cover fraud or deceit when it is perpetrated against a municipality. Accordingly, the Commission will substitute the word ''entity'' for ''person'' in sections 1c.1(a)(3) and 1c.2(a)(3) of the final rule.[145]

2. Impact of New Regulations on the Policy Statement on Natural Gas and Electric Price Indices

a. Comments

77. NGSA requests that the Commission clarify that the new regulations do not modify or supersede the Commission's Policy Statement on Natural Gas and Electric Price Indices.[146]

b. Commission Determination

78. The Commission clarifies that the new regulations are not intended to modify or supersede the Commission's Policy Statement on Natural Gas and

[134] INGAA at 12; ISDA Reply at 5.

[135] Even if a complaint were to involve NGA section 5 or FPA section 206 in some manner, that does not mean that the Commission would be limited only to prospective remedies, as Cinergy seems to suggest. Certain violations are susceptible of remedies from the time the violation occurred. *See, e.g., Consolidated Gas Transmission Corp.,* 771 F.2d 1536 (D.C. Cir. 1985) (retroactive remedy available under NGA section 16).

[136] 18 CFR 385.206 (2005).

[137] ''[T]he Commission has broad authority to fashion equitable remedies in a variety of settings.'' *Columbia Gas Transmission Corp.* v. *FERC*, 750 F.2d 105, 109 (DC Cir. 1984) and cases cited therein. The courts have noted that ''the breadth of agency discretion is, if anything, at zenith when the action assailed relates primarily * * * to the fashioning of policies, remedies, and sanctions * * * to arrive at maximum effectuation of Congressional objectives.'' *Niagara Mohawk Corp.* v. *FPC*, 379 F.2d 153, 159 (DC Cir. 1967).

[138] *Gulf Oil Corp.* v. *FPC*, 536 F.2d 588 (3rd Cir. 1977), *cert. denied*, 434 U.S. 1062 (1978), *reh'g denied*, 435 U.S. 981 (1978).

[139] *FPC* v. *Tennessee Gas Transmission Co.*, 371 U.S. 145 (1962); *Continental Oil Co.* v. *FPC*, 378 F.2d 510 (5th Cir. 1967).

[140] *See* 18 CFR 1b.21 (2005)

[141] *See* 18 CFR 1b.18 (2005).

[142] *See* APGA at 10–11; APPA at 2–4.

[143] APPA at 2–3.

[144] APGA at 10.

[145] As noted, the final rule will appear in 18 CFR 1c.1 and 1c.2 of the Commission's Rules of General Applicability, and the language change will be in 18 CFR 1c.1(a)(3) and 1c.2(a)(3).

[146] NGSA at 8–9. *See Policy Statement on Natural Gas and Electric Price Indices*, 104 FERC § 61,121 (2003) (explaining the conditions under which the Commission will give industry participants safe harbor protection for good faith reporting of transactions data to entities that develop price indices).

Electric Price Indices. That Policy Statement provided guidance on how market participants should report price transaction information to price index developers, and stated that if the Policy Statement guidelines are followed, participants would not be penalized for inadvertent errors. We continue to encourage market participants to contribute to price formation and to utilize the guidelines of the Policy Statement when reporting pricing information. We also note that if an inadvertent error occurs, it would not involve the scienter needed for application of the final rule.

3. Special Pleading

a. Comments

79. AEP argues that the Commission should discourage general allegations of fraud by requiring parties that bring an action under the proposed rule to plead with ''sufficient particularity'' by addressing eight items.[147] Other commenters, however, argue that the Commission should not adopt special pleading requirements beyond its notice provisions and existing complaint procedures.[148]

b. Commission Determination

80. Commenters' concerns regarding special pleading requirements are clearly covered by Rule 206 of the Commission's Rules of Practice and Procedure, which contains detailed requirements as to the specificity required by parties filing complaints with the Commission. For instance, under Rule 206(b)(1)–(2), a complaint must ''clearly identify the action or inaction which is alleged to violate applicable statutory or regulatory requirements,'' and must ''explain how the action violates statutory or regulatory requirements.'' [149] Similarly, in Order No. 663, the Commission sets forth the requirement that issues must be listed with specificity in a separate section entitled ''Statement of Issues.'' [150]

IV. Regulatory Flexibility Act Certification

81. The Regulatory Flexibility Act of 1980 [151] generally requires a description and analysis of a final rule that will have significant economic impact on a substantial number of small entities.[152] The Commission is not required to make such analyses if a rule would not have such an effect.

82. The Commission concludes that this final rule would not have such an impact on small entities. This final rule prohibits all entities, including small entities, from employing manipulative or deceptive devices or contrivances in connection with energy markets subject to the Commission's jurisdiction, and therefore may cause entities, including potentially small entities, to increase costs in order to comply. This prohibition, however, will improve market transparency to the economic benefit of all entities, including small entities. Therefore, the Commission certifies that this final rule will not have a significant economic impact on a substantial number of small entities. Therefore, no regulatory flexibility analysis is required.

V. Information Collection Statement

83. This final rule implements the existing requirements as set forth in sections 315 and 1283 of EPAct 2005 and does not include new information requirements under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

VI. Environmental Statement

84. The Commission is required to prepare an Environmental Assessment or an Environmental Impact Statement for any action that may have a significant adverse effect on the human environment.[153] The Commission has categorically excluded certain actions from this requirement as not having a significant effect on the human environment. Included in the exclusion are rules that are clarifying, corrective, or procedural or that do not substantially change the effect of the regulations being amended.[154] Thus, we affirm the finding we made in the NOPR that this final rule is procedural in nature and therefore falls under this exception; consequently, no environmental consideration would be necessary.

VII. Document Availability

85. In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the Internet through the Commission's Home Page (*http://www.ferc.gov*) and in the Commission's Public Reference Room during normal business hours (8:30 a.m. to 5 p.m. Eastern time) at 888 First Street, NE., Room 2A, Washington, DC 20426.

86. From the Commission's Home Page on the Internet, this information is available in the eLibrary. The full text of this document is available on eLibrary both in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in eLibrary, type the docket number excluding the last three digits of this document in the docket number field.

87. User assistance is available for eLibrary and the Commission's Web site during normal business hours. For assistance, please contact Online Support at 1–866–208–3676 (toll free) or 202–502–6652 (e-mail at *FERCOnlineSupport@FERC.gov*), or the Public Reference Room at 202–502–8371, TTY 202–502–8659 (e-mail at *public.referenceroom@ferc.gov*).

VIII. Effective Date and Congressional Notification

88. This final rule will take effect upon publication in the **Federal Register**. The Commission has determined, with the concurrence of the Administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budget, that this rule is not a major rule within

[147] AEP at 3–4. The eight items are: (1) What identifiable acts or omissions occurred, what representations were made and why they were not accurate but constituted a scheme or device to defraud; (2) when and where each act occurred; (3) who participated, that is, how each entity is related to the case; (4) what specific documents contained what specific misrepresentations or material omissions; (5) how a party relied on the other party's actions; (6) whether the necessary element of scienter was present; (7) when the purchase, sale, or transmission of electric energy or natural gas occurred; and (8) what the offending party gained as a result of the fraud.

[148] *See, e.g.*, TDUS Reply at 9.

[149] *See Wisconsin Department of Natural Resources* v. *Wisconsin River Power Company*, 101 FERC § 61,108 at P 5 (2002) (rejecting complaint). *See also Union Electric Company, d/b/a AmerenUE*, 93 FERC § 61,158 at 61,529 (2000) (denying a request for a hearing, citing Rule 206(b)(1), (2), and (8), and stating that ''[t]he Commission's rules require a complaint not only to identify clearly the action that is alleged to violate applicable statutory standards or regulatory requirements, but to explain *how* the action violates those standards or requirements, and to include all documents in the complainant's possession that support the facts in the complaint'').

[150] *See Revision of Rules of Practice and Procedure Regarding Issue Identification*, 70 FR 55723 (2005), FERC Stats. & Regs. § 31,193 (2005).

[151] 5 U.S.C. 601–612 (2000).

[152] The RFA definition of ''small entity'' refers to the definition provided in the Small Business Act, which defines a ''small business concern'' as a business which is independently owned and operated and which is not dominant in its field of operation. 15 U.S.C. 632 (2000). The Small Business Size Standards component of the North American Industry Classification System defines a small electric utility as one that, including its affiliates, is primarily engaged in the generation, transmission, and/or distribution of electric energy for sale and whose total electric output for the preceding fiscal years did not exceed 4 million MWh. 13 CFR 121.201 (Section 22, Utilities, North American Industry Classification System, NAICS) (2004).

[153] *Regulations Implementing the National Environmental Policy Act*, Order No. 486, 52 FR 47897 (1987), FERC Stats. & Regs. § 30,783 (1987).

[154] 18 CFR 380.4(a)(2)(ii) (2005).

the meaning of section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996.[155] The Commission will submit the final rule to both houses of Congress and the Government Accountability Office.[156]

89. A non-major rule goes into effect ''as otherwise provided by law after submission to Congress.''[157] The effective date may be sooner if the agency ''for good cause'' finds that ''notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.''[158] The Administrative Procedure Act (APA)[159] requires rulemakings to be published in the **Federal Register**. The APA generally mandates that publication or service of a substantive rule not be made less than 30 days before its effective date. This waiting period is not required, however, if the agency finds ''good cause'' for waiving the 30 day waiting period.[160]

90. The Commission finds that ''good cause'' exists that makes further notice and public procedure impracticable, unnecessary, or contrary to the public interest. The Commission has balanced the necessity for immediate implementation of this final rule against the principles of fundamental fairness which require that all affected persons be afforded reasonable time to prepare for the effective date of this ruling. The Commission is of the view that the persistent high energy prices in the wake of severe damage to the United States energy infrastructure from the hurricanes of 2005, together with the potential for severe price events in the event of cold winter weather during the winter months of 2006, may present opportunities for energy price manipulation. It would be contrary to the public interest to delay regulations that implement Congressional intent to prohibit manipulation in energy markets. Immediate adoption of the final rule will protect natural gas and electricity markets from manipulative conduct. Moreover, the public has had an opportunity to comment on the proposed rules, and the final rule being adopted is substantively the same as the rule that was proposed. Finally, the conduct proscribed by the final rule is similar to the conduct already proscribed by the Market Behavior Rules. Market participants should not have difficulty preparing to comply with a rule that bars manipulation in energy markets, particularly since many such participants are currently subject to the existing Market Behavior Rule provisions prohibiting manipulation. This final rule, therefore, will be made effective upon publication in the **Federal Register**.

[155] 5 U.S.C. 804(2) (2000).

[156] 5 U.S.C. 801(a)(1)(A) (2000).

[157] 5 U.S.C. 801(a)(4) (2000).

[158] 5 U.S.C. 808(2) (2000).

[159] 5 U.S.C. 551, *et seq.* (2000).

[160] 5 U.S.C. 553(d)(3) (2000).

List of Subjects in 18 CFR Part 1c

Electric utilities, Natural gas.

By the Commission.

Magalie R. Salas,

Secretary.

■ In consideration of the foregoing, under the authority of EPAct 2005, the Commission amends Chapter I, Title 18, *Code of Federal Regulations,* by adding Part 1c to read as follows:

PART 1c—PROHIBITION OF ENERGY MARKET MANIPULATION

Sec.

Authority: 15 U.S.C. 717–717z; 16 U.S.C. 791–825r, 2601–2645; 42 U.S.C. 7101–7352.

§ 1c.1 Prohibition of natural gas market manipulation.

(a) It shall be unlawful for any entity, directly or indirectly, in connection with the purchase or sale of natural gas or the purchase or sale of transportation services subject to the jurisdiction of the Commission,

(1) To use or employ any device, scheme, or artifice to defraud,

(2) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) To engage in any act, practice, or course of business that operates or would operate as a fraud or deceit upon any entity.

(b) Nothing in this section shall be construed to create a private right of action.

§ 1c.2 Prohibition of electric energy market manipulation.

(a) It shall be unlawful for any entity, directly or indirectly, in connection with the purchase or sale of electric energy or the purchase or sale of transmission services subject to the jurisdiction of the Commission,

(1) To use or employ any device, scheme, or artifice to defraud,

(2) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) To engage in any act, practice, or course of business that operates or would operate as a fraud or deceit upon any entity.

(b) Nothing in this section shall be construed to create a private right of action.

Note: The following Appendix will not be published in the Code of Federal Regulations.

Appendix—List of Parties Filing Comments and Reply Comments and Acronyms

Ameren Services Co. (Ameren)
American Electric Power Service Corporation (AEP)
American Gas Association (AGA)
American Public Gas Association (APGA) * *
American Public Power Association (APPA) * *
Association of Oil Pipelines (AOPL)
BP Energy Co. (BP)
Cinergy Services, Inc. (Cinergy) * *
Constellation Energy Group, Inc., DTE Energy Company and Sempra Energy (Indicated Market Participants)
DTE Energy Company (DTE)
Edison Electric Institute (EEI) * *
Electric Power Supply Association (EPSA)
FirstEnergy Service Co. (FirstEnergy)
International Swaps and Derivatives Association, Inc. (ISDA) * *
Interstate Natural Gas Association of America (INGAA)
LG&E Energy LLC (LG&E)
Midwest Independent Transmission System Operator, Inc. (Midwest ISO)
Missouri Public Service Commission
National Association of Regulatory Utility Commissioners (NARUC) * *
National Association of State Utility Consumer Advocates (NASUCA)
National Rural Electric Cooperative Association (NRECA) *
Natural Gas Supply Association (NGSA)
New Jersey Board of Public Utilities (NJBPU)
NiSource, Inc. (NiSource)
Pacific Gas and Electric Co. (PG&E)
PNM Resources, Inc. (PNM) *
Progress Energy Inc. (Progress)
SCANA Energy Marketing, Inc. (SCANA)
Southern California Edison Company (SCE)
States of Illinois, Iowa, Minnesota, Missouri and Wisconsin (States)
SUEZ Energy North America, Inc. (SUEZ)
Transmission Dependent Utility Systems (TDUS) *
Xcel Energy Services Inc. (Xcel)

* Entities filing reply comments only.

* * Entities filing reply comments in addition to initial comments.

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DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9242]

RIN 1545–BA06; 1545–BD76

Statutory Mergers and Consolidations

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations that define the term *statutory merger or consolidation* as that term is used in section 368(a)(1)(A) of the Internal Revenue Code, concerning corporate reorganizations. These final regulations affect corporations engaging in statutory mergers and consolidations, and their shareholders.

DATES: *Effective Date:* These regulations are effective January 23, 2006.

FOR FURTHER INFORMATION CONTACT: Richard M. Heinecke, at (202) 622–7930 (not a toll free number).

SUPPLEMENTARY INFORMATION:

Background

The Internal Revenue Code of 1986 (Code) provides for general nonrecognition treatment for reorganizations described in section 368 of the Code. Section 368(a)(1)(A) provides that the term reorganization includes *a statutory merger or consolidation.* On January 24, 2003, the IRS and Treasury Department published temporary regulations (TD 9038) in the **Federal Register** (68 FR 3384) (the 2003 temporary regulations), along with a notice of proposed rulemaking by cross-reference to the temporary regulations (REG–126485–01) (the 2003 proposed regulations), defining *statutory merger or consolidation.* The 2003 temporary regulations generally provide that a statutory merger or consolidation is a transaction effected pursuant to the laws of the United States or a State or the District of Columbia, in which, as a result of the operation of such laws, all of the assets and liabilities of the target corporation are acquired by the acquiring corporation and the target corporation ceases its separate legal existence for all purposes. Under the 2003 temporary regulations, the merger of a target corporation into a limited liability company that is disregarded as a separate entity from the acquiring corporation for Federal income tax purposes may qualify as a statutory merger or consolidation.

No public hearing regarding the 2003 proposed regulations was requested or held. Nonetheless, a number of comments were received.

As described above, under the 2003 temporary regulations, a transaction can only qualify as a statutory merger or consolidation if the transaction is effected ''pursuant to the laws of the United States, or a State or the District of Columbia.'' Given that many foreign jurisdictions have merger or consolidation statutes that operate in material respects like those of the states, on January 5, 2005, the IRS and Treasury Department proposed regulations (the 2005 proposed regulations) containing a revised definition of statutory merger or consolidation that allows transactions effected pursuant to the statutes of a foreign jurisdiction or of a United States possession to qualify as a statutory merger or consolidation (70 FR 746). Simultaneously with the publication of the 2005 proposed regulations, the IRS and Treasury Department published a notice of proposed rulemaking proposing amendments to the regulations under sections 358, 367, and 884 to reflect that, under the 2005 proposed regulations, a transaction involving a foreign entity and a transaction effected pursuant to the laws of a foreign jurisdiction may qualify as a statutory merger or consolidation (the foreign regulations).

Explanation of Provisions

The IRS and Treasury Department have received comments regarding the 2005 proposed regulations and the foreign regulations. This Treasury decision adopts the 2005 proposed regulations as final regulations, with certain technical changes. The foreign regulations are adopted as final regulations in a separate Treasury decision. The following sections describe a number of the most significant comments received with respect to the 2003 proposed regulations and the 2005 proposed regulations and the extent to which they have been adopted in the final regulations.

A. State Law Conversions

A number of commentators have questioned whether under the 2003 temporary regulations a transaction involving a state law conversion of a corporation into a limited liability company that is disregarded as an entity separate from its owner for Federal income tax purposes can qualify as a statutory merger or consolidation under section 368(a)(1)(A). For example, suppose A, a corporation, acquires all of the stock of T, a corporation, in exchange for consideration 50 percent of which is A voting stock and 50 percent of which is cash. As part of an integrated transaction, immediately after the stock acquisition, T files a form with the secretary of state of its state of organization to convert its form of organization from a corporation to a limited liability company. Some commentators have suggested that the conversion of T into a single member limited liability company disregarded as an entity separate from A should be treated like the merger of T into a pre-existing single member limited liability company that is disregarded as an entity separate from A. In the latter case, the overall transaction may qualify as a statutory merger or consolidation of T into A under the 2003 temporary regulations. Commentators have suggested that there is no policy reason to require T to actually merge into the entity that is disregarded as separate from A for A's acquisition of the T assets to qualify as a statutory merger or consolidation. Although the conversion does not involve the fusion under state or local law of a target corporation into a pre-existing entity, it is similar to a statutory merger in that it accomplishes simultaneously the transfer for Federal income tax purposes of all of the assets of the target corporation to the acquiring corporation and the elimination for Federal income tax purposes of the target corporation as a corporation.

A similar question arises when the target corporation is an eligible entity under § 301.7701–3(a), rather than a per se corporation, and the status of the target for Federal income tax purposes is changed through an Entity Classification Election under § 301.7701–3 rather than through a conversion under state law. In this case, no action under state or local law effects the transfer of the assets of the target corporation to the acquiring corporation. Nevertheless, the election also accomplishes the simultaneous transfer for Federal income tax purposes of all of the assets of the target corporation to the acquiring corporation and the elimination for Federal income tax purposes of the target corporation as a corporation.

As described above, the 2003 temporary regulations provide that a transaction can only qualify as a statutory merger or consolidation if the target corporation ceases its separate legal existence for all purposes. The final regulations retain this requirement. In a conversion, the target corporation's legal existence does not cease to exist under state law. Its legal existence continues in a different form. Therefore, a stock acquisition of a target corporation followed by the conversion of the target corporation from a

corporation to a limited liability company under state law cannot qualify as a statutory merger or consolidation under these final regulations. Consequently, pending further consideration of this issue, these final regulations clarify that such an acquisition cannot qualify as a statutory merger or consolidation.

Nevertheless, the IRS and Treasury Department are considering whether a stock acquisition followed by a conversion of the acquired corporation to an entity disregarded as separate from its corporate owner, and whether a stock acquisition followed by a change in the entity classification of the acquired entity from a corporation to an entity disregarded as separate from its corporate owner, should be permitted to qualify as a statutory merger or consolidation. The IRS and Treasury Department are interested in receiving comments in this regard. In addition, the IRS and Treasury Department are interested in comments regarding what implications, if any, permitting these two-step transactions to qualify as a statutory merger or consolidation would have on Revenue Ruling 67–274 (1967–2 C.B. 141) (ruling that an acquisition of stock of a target corporation followed by a liquidation of the target corporation qualified as a reorganization under section 368(a)(1)(C)) and Revenue Ruling 72–405 (1972–2 C.B. 217) (ruling that a forward triangular merger of a subsidiary of an acquiring corporation followed by a liquidation of the subsidiary qualified as a reorganization under section 368(a)(1)(C)).

B. Existence and Composition of the Transferee Unit

The 2003 proposed regulations generally require that, in order for a transaction to qualify as a statutory merger or consolidation, all of the assets and liabilities of each member of the transferor combining unit become the assets and liabilities of one or more members of one other combining unit (the transferee unit). For this purpose, a combining unit is a combining entity and all of its disregarded entities and a combining entity is a business entity that is a corporation (as defined in § 301.7701–2(b)) that is not a disregarded entity). As described above, the definition of statutory merger or consolidation allows for the possibility that a merger of a corporation into an entity disregarded as an entity separate from an acquiring corporation could qualify as a statutory merger or consolidation.

One commentator stated that while it is clear that the existence and composition of the transferor unit are tested only immediately before the transaction and that the existence and composition of the transferee unit are tested immediately after the transaction, it is not clear whether the existence and composition of the transferee unit are also tested immediately prior to the transaction. This ambiguity, the commentator argued, creates uncertainty as to whether the following transaction can qualify as a statutory merger or consolidation: A and T, both corporations, together own all of the membership interests in P, a limited liability company that is treated as a partnership for Federal income tax purposes. T merges into P. In the merger, the shareholders of T exchange their T stock for A stock. As a result of the merger, P becomes an entity that is disregarded as an entity separate from A. If the existence and composition of the transferee unit were tested only after the transaction, the transaction could qualify as a statutory merger or consolidation. However, if the existence and composition of the transferee unit were tested both before and after the transaction, the transaction would not qualify for tax-free treatment because, before the merger, P is not a member of the transferee unit because it is not treated as an entity that is disregarded as an entity separate from A for Federal income tax purposes.

The IRS and Treasury Department believe that the transaction described should qualify as a statutory merger or consolidation. Accordingly, these final regulations include an example that illustrates that the existence and composition of the transferee unit is not tested immediately prior to the transaction but instead is only tested immediately after the transaction. Therefore, the merger of T into P may qualify as a statutory merger or consolidation. Moreover, A would be a party to the reorganization, permitting nonrecognition under the operative reorganization provisions of subchapter C of the Code.

Treating the merger of T into P as a reorganization raises questions as to the tax consequences of the transaction to the parties, including whether gain or loss may be recognized under the partnership rules of subchapter K as a result of the termination of P. Similar questions are raised in a merger of T directly into A that qualifies as a reorganization where, in the transaction, P becomes disregarded as an entity separate from A for Federal income tax purposes. The IRS and Treasury Department are considering the tax consequences in these cases, including the extent to which the principles of Revenue Ruling 99–6 apply in these situations and, if they do apply, their consequences. The IRS and Treasury Department request comments in this regard.

C. Consolidations and Amalgamations

Questions have arisen regarding the application of the definition of statutory merger or consolidation to transactions that are effected under state law consolidation statutes and foreign law amalgamation statutes. In a state law consolidation and a foreign law amalgamation, typically, two or more corporations combine and continue in the resulting entity, which is a new corporation that is formed in the consolidation transaction. Some commentators have asked whether a consolidation or an amalgamation can qualify as a statutory merger or consolidation under section 368(a)(1)(A) if effected pursuant to a law that provides that the consolidating or amalgamating corporations continue as one corporation in the resulting corporation. Those commentators are concerned that, because the existence of each of the consolidating corporations or amalgamating corporations continues in the resulting corporation, the requirement that the transferee corporation cease its separate legal existence for all purposes may not be satisfied.

The IRS and Treasury Department believe that the fact that the existence of the consolidating or amalgamating corporations continues in the resulting corporation will not prevent a consolidation from qualifying as a statutory merger or consolidation under the 2003 temporary regulations. The 2003 temporary regulations require that the separate legal existence of the target corporation ceases. In a consolidation or an amalgamation, even if the governing law provides that the existence of the consolidating or amalgamating entities continues in the resulting corporation, the separate legal existence of the consolidating or amalgamating entities does in fact cease. Therefore, the IRS and Treasury Department do not believe that the fact that the existence of the consolidating or amalgamating entities continues in the resulting corporation prevents a consolidation or an amalgamation from qualifying as a statutory merger or consolidation.

Other commentators have questioned whether a consolidation or amalgamation of two operating corporations can involve a reorganization under section 368(a)(1)(F) with respect to one and a reorganization under section 368(a)(1)(A) with respect to the other. For example, suppose that X and Y,

both operating corporations, consolidate pursuant to state law. In the consolidation, X and Y result in Z, a new corporation. The shareholders of X and Y surrender their X and Y stock, respectively, in exchange for Z stock. Some commentators have suggested that the consolidation could be viewed as a transfer by X of its assets and liabilities to Z in a reorganization under section 368(a)(1)(F) followed by a merger of Y into Z in a reorganization under section 368(a)(1)(A). Alternatively, it could be viewed as a transfer by Y of its assets and liabilities to Z in a reorganization under section 368(a)(1)(F) followed by a merger of X into Z in a reorganization under section 368(a)(1)(A). The IRS and Treasury Department intend to further study this issue in connection with their separate study of reorganizations under section 368(a)(1)(F).

Questions have also arisen regarding the application of the definition of statutory merger or consolidation to triangular transactions involving consolidations and amalgamations. For example, suppose that A seeks to acquire both X and Y, each in exchange for consideration that is 50 percent A voting stock and 50 percent cash. Under state law, X and Y consolidate into Z, a corporation that results from the acquisition transaction as a wholly owned subsidiary of A. The IRS and Treasury Department believe that a triangular consolidation or amalgamation should be tested under the reorganization rules as a forward triangular merger of each of the consolidating or amalgamating corporations into a wholly owned subsidiary of the parent corporation. Such a transaction might qualify as a statutory merger or consolidation pursuant to the rules of section 368(a)(2)(D). The IRS and Treasury Department recognize that in triangular consolidations and triangular amalgamations, the corporation the stock of which is used in the transaction (A) does not control the acquiring corporation (Z) immediately before the transaction. Nonetheless, the IRS and Treasury Department do not believe that section 368(a)(2)(D) requires the corporation the stock of which is used in the transaction to control the acquiring corporation immediately prior to the transaction and that such corporation's control of the acquiring corporation immediately after the transaction is sufficient to satisfy that requirement of section 368(a)(2)(D). Therefore, these final regulations include an example that illustrates the application of section 368(a)(2)(D) to a triangular amalgamation.

Special Analysis

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations and, because these regulations do not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Therefore, a Regulatory Flexibility Analysis is not required. Pursuant to section 7805(f) of the Code, the proposed regulations preceding these regulations were submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small business.

Drafting Information

The principal author of these final regulations is Richard M. Heinecke of the Office of Associate Chief Counsel (Corporate). However, other personnel from the IRS and Treasury Department participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

■ Accordingly, 26 CFR part 1 is amended as follows:

PART 1—INCOME TAXES

■ **Paragraph 1.** The authority citation for part 1 continues to read, in part, as follows:

Authority: 26 U.S.C. 7805 * * *

■ **Par. 2.** Section 1.368–2 is amended by revising paragraph (b)(1) to read as follows:

§ 1.368–2 Definition of terms.

* * * * *

(b)(1)(i) *Definitions.* For purposes of this paragraph (b)(1), the following terms shall have the following meanings:

(A) *Disregarded entity.* A disregarded entity is a business entity (as defined in § 301.7701–2(a) of this chapter) that is disregarded as an entity separate from its owner for Federal income tax purposes. Examples of disregarded entities include a domestic single member limited liability company that does not elect to be classified as a corporation for Federal income tax purposes, a corporation (as defined in § 301.7701–2(b) of this chapter) that is a qualified REIT subsidiary (within the meaning of section 856(i)(2)), and a corporation that is a qualified subchapter S subsidiary (within the meaning of section 1361(b)(3)(B)).

(B) *Combining entity.* A combining entity is a business entity that is a corporation (as defined in § 301.7701–2(b) of this chapter) that is not a disregarded entity.

(C) *Combining unit.* A combining unit is composed solely of a combining entity and all disregarded entities, if any, the assets of which are treated as owned by such combining entity for Federal income tax purposes.

(ii) *Statutory merger or consolidation generally.* For purposes of section 368(a)(1)(A), a statutory merger or consolidation is a transaction effected pursuant to the statute or statutes necessary to effect the merger or consolidation, in which transaction, as a result of the operation of such statute or statutes, the following events occur simultaneously at the effective time of the transaction—

(A) All of the assets (other than those distributed in the transaction) and liabilities (except to the extent such liabilities are satisfied or discharged in the transaction or are nonrecourse liabilities to which assets distributed in the transaction are subject) of each member of one or more combining units (each a transferor unit) become the assets and liabilities of one or more members of one other combining unit (the transferee unit); and

(B) The combining entity of each transferor unit ceases its separate legal existence for all purposes; provided, however, that this requirement will be satisfied even if, under applicable law, after the effective time of the transaction, the combining entity of the transferor unit (or its officers, directors, or agents) may act or be acted against, or a member of the transferee unit (or its officers, directors, or agents) may act or be acted against in the name of the combining entity of the transferor unit, provided that such actions relate to assets or obligations of the combining entity of the transferor unit that arose, or relate to activities engaged in by such entity, prior to the effective time of the transaction, and such actions are not inconsistent with the requirements of paragraph (b)(1)(ii)(A) of this section.

(iii) *Examples.* The following examples illustrate the rules of paragraph (b)(1) of this section. In each of the examples, except as otherwise provided, each of R, V, Y, and Z is a C corporation. X is a domestic limited liability company. Except as otherwise provided, X is wholly owned by Y and is disregarded as an entity separate from

Y for Federal income tax purposes. The examples are as follows:

Example 1. Divisive transaction pursuant to a merger statute. (i) *Facts.* Under State W law, Z transfers some of its assets and liabilities to Y, retains the remainder of its assets and liabilities, and remains in existence for Federal income tax purposes following the transaction. The transaction qualifies as a merger under State W corporate law.

(ii) *Analysis.* The transaction does not satisfy the requirements of paragraph (b)(1)(ii)(A) of this section because all of the assets and liabilities of Z, the combining entity of the transferor unit, do not become the assets and liabilities of Y, the combining entity and sole member of the transferee unit. In addition, the transaction does not satisfy the requirements of paragraph (b)(1)(ii)(B) of this section because the separate legal existence of Z does not cease for all purposes. Accordingly, the transaction does not qualify as a statutory merger or consolidation under section 368(a)(1)(A).

Example 2. Merger of a target corporation into a disregarded entity in exchange for stock of the owner. (i) *Facts.* Under State W law, Z merges into X. Pursuant to such law, the following events occur simultaneously at the effective time of the transaction: all of the assets and liabilities of Z become the assets and liabilities of X and Z's separate legal existence ceases for all purposes. In the merger, the Z shareholders exchange their stock of Z for stock of Y.

(ii) *Analysis.* The transaction satisfies the requirements of paragraph (b)(1)(ii) of this section because the transaction is effected pursuant to State W law and the following events occur simultaneously at the effective time of the transaction: all of the assets and liabilities of Z, the combining entity and sole member of the transferor unit, become the assets and liabilities of one or more members of the transferee unit that is comprised of Y, the combining entity of the transferee unit, and X, a disregarded entity the assets of which Y is treated as owning for Federal income tax purposes, and Z ceases its separate legal existence for all purposes. Accordingly, the transaction qualifies as a statutory merger or consolidation for purposes of section 368(a)(1)(A).

Example 3. Merger of a target S corporation that owns a QSub into a disregarded entity. (i) *Facts.* The facts are the same as in *Example 2,* except that Z is an S corporation and owns all of the stock of U, a QSub.

(ii) *Analysis.* The deemed formation by Z of U pursuant to § 1.1361–5(b)(1) (as a consequence of the termination of U's QSub election) is disregarded for Federal income tax purposes. The transaction is treated as a transfer of the assets of U to X, followed by X's transfer of these assets to U in exchange for stock of U. See § 1.1361–5(b)(3) *Example 9.* The transaction will, therefore, satisfy the requirements of paragraph (b)(1)(ii) of this section because the transaction is effected pursuant to State W law and the following events occur simultaneously at the effective time of the transaction: all of the assets and liabilities of Z and U, the sole members of the transferor unit, become the assets and liabilities of one or more members of the transferee unit that is comprised of Y, the combining entity of the transferee unit, and X, a disregarded entity the assets of which Y is treated as owning for Federal income tax purposes, and Z ceases its separate legal existence for all purposes. Moreover, the deemed transfer of the assets of U in exchange for U stock does not cause the transaction to fail to qualify as a statutory merger or consolidation. See § 368(a)(2)(C). Accordingly, the transaction qualifies as a statutory merger or consolidation for purposes of section 368(a)(1)(A).

Example 4. Triangular merger of a target corporation into a disregarded entity. (i) *Facts.* The facts are the same as in *Example 2,* except that V owns 100 percent of the outstanding stock of Y and, in the merger of Z into X, the Z shareholders exchange their stock of Z for stock of V. In the transaction, Z transfers substantially all of its properties to X.

(ii) *Analysis.* The transaction is not prevented from qualifying as a statutory merger or consolidation under section 368(a)(1)(A), provided the requirements of section 368(a)(2)(D) are satisfied. Because the assets of X are treated for Federal income tax purposes as the assets of Y, Y will be treated as acquiring substantially all of the properties of Z in the merger for purposes of determining whether the merger satisfies the requirements of section 368(a)(2)(D). As a result, the Z shareholders that receive stock of V will be treated as receiving stock of a corporation that is in control of Y, the combining entity of the transferee unit that is the acquiring corporation for purposes of section 368(a)(2)(D). Accordingly, the merger will satisfy the requirements of section 368(a)(2)(D).

Example 5. Merger of a target corporation into a disregarded entity owned by a partnership. (i) *Facts.* The facts are the same as in *Example 2,* except that Y is organized as a partnership under the laws of State W and is classified as a partnership for Federal income tax purposes.

(ii) *Analysis.* The transaction does not satisfy the requirements of paragraph (b)(1)(ii)(A) of this section. All of the assets and liabilities of Z, the combining entity and sole member of the transferor unit, do not become the assets and liabilities of one or more members of a transferee unit because neither X nor Y qualifies as a combining entity. Accordingly, the transaction cannot qualify as a statutory merger or consolidation for purposes of section 368(a)(1)(A).

Example 6. Merger of a disregarded entity into a corporation. (i) *Facts.* Under State W law, X merges into Z. Pursuant to such law, the following events occur simultaneously at the effective time of the transaction: all of the assets and liabilities of X (but not the assets and liabilities of Y other than those of X) become the assets and liabilities of Z and X's separate legal existence ceases for all purposes.

(ii) *Analysis.* The transaction does not satisfy the requirements of paragraph (b)(1)(ii)(A) of this section because all of the assets and liabilities of a transferor unit do not become the assets and liabilities of one or more members of the transferee unit. The transaction also does not satisfy the requirements of paragraph (b)(1)(ii)(B) of this section because X does not qualify as a combining entity. Accordingly, the transaction cannot qualify as a statutory merger or consolidation for purposes of section 368(a)(1)(A).

Example 7. Merger of a corporation into a disregarded entity in exchange for interests in the disregarded entity. (i) *Facts.* Under State W law, Z merges into X. Pursuant to such law, the following events occur simultaneously at the effective time of the transaction: all of the assets and liabilities of Z become the assets and liabilities of X and Z's separate legal existence ceases for all purposes. In the merger of Z into X, the Z shareholders exchange their stock of Z for interests in X so that, immediately after the merger, X is not disregarded as an entity separate from Y for Federal income tax purposes. Following the merger, pursuant to § 301.7701–3(b)(1)(i) of this chapter, X is classified as a partnership for Federal income tax purposes.

(ii) *Analysis.* The transaction does not satisfy the requirements of paragraph (b)(1)(ii)(A) of this section because immediately after the merger X is not disregarded as an entity separate from Y and, consequently, all of the assets and liabilities of Z, the combining entity of the transferor unit, do not become the assets and liabilities of one or more members of a transferee unit. Accordingly, the transaction cannot qualify as a statutory merger or consolidation for purposes of section 368(a)(1)(A).

Example 8. Merger transaction preceded by distribution. (i) *Facts.* Z operates two unrelated businesses, Business P and Business Q, each of which represents 50 percent of the value of the assets of Z. Y desires to acquire and continue operating Business P, but does not want to acquire Business Q. Pursuant to a single plan, Z sells Business Q for cash to parties unrelated to Z and Y in a taxable transaction, and then distributes the proceeds of the sale pro rata to its shareholders. Then, pursuant to State W law, Z merges into Y. Pursuant to such law, the following events occur simultaneously at the effective time of the transaction: all of the assets and liabilities of Z related to Business P become the assets and liabilities of Y and Z's separate legal existence ceases for all purposes. In the merger, the Z shareholders exchange their Z stock for Y stock.

(ii) *Analysis.* The transaction satisfies the requirements of paragraph (b)(1)(ii) of this section because the transaction is effected pursuant to State W law and the following events occur simultaneously at the effective time of the transaction: all of the assets and liabilities of Z, the combining entity and sole member of the transeferor unit, become the assets and liabilities of Y, the combining entity and sole member of the transferee unit, and Z ceases its separate legal existence for all purposes. Accordingly, the transaction qualifies as a statutory merger or consolidation for purposes of section 368(a)(1)(A).

Example 9. State law conversion of target corporation into a limited liability company. (i) *Facts.* Y acquires the stock of V from the V shareholders in exchange for consideration

that consists of 50 percent voting stock of Y and 50 percent cash. Immediately after the stock acquisition, V files the necessary documents to convert from a corporation to a limited liability company under State W law. Y's acquisition of the stock of V and the conversion of V to a limited liability company are steps in a single integrated acquisition by Y of the assets of V.

(ii) *Analysis.* The acquisition by Y of the assets of V does not satisfy the requirements of paragraph (b)(1)(ii)(B) of this section because V, the combining entity of the transferor unit, does not cease its separate legal existence. Although V is an entity disregarded from its owner for Federal income tax purposes, it continues to exist as a juridical entity after the conversion. Accordingly, Y's acquisition of the assets of V does not qualify as a statutory merger or consolidation for purposes of section 368(a)(1)(A).

Example 10. Dissolution of target corporation. (i) *Facts.* Y acquires the stock of Z from the Z shareholders in exchange for consideration that consists of 50 percent voting stock of Y and 50 percent cash. Immediately after the stock acquisition, Z files a certificate of dissolution pursuant to State W law and commences winding up its activities. Under State W dissolution law, ownership and title to Z's assets does not automatically vest in Y upon dissolution. Instead, Z transfers assets to its creditors in satisfaction of its liabilities and transfers its remaining assets to Y in the liquidation stage of the dissolution. Y's acquisition of the stock of Z and the dissolution of Z are steps in a single integrated acquisition by Y of the assets of Z.

(ii) *Analysis.* The acquisition by Y of the assets of Z does not satisfy the requirements of paragraph (b)(1)(ii) of this section because Y does not acquire all of the assets of Z as a result of Z filing the certificate of dissolution or simultaneously with Z ceasing its separate legal existence. Instead, Y acquires the assets of Z by reason of Z's transfer of its assets to Y. Accordingly, Y's acquisition of the assets of Z does not qualify as a statutory merger or consolidation for purposes of section 368(a)(1)(A).

Example 11. Merger of corporate partner into a partnership. (i) *Facts.* Y owns an interest in X, an entity classified as a partnership for Federal income tax purposes, that represents a 60 percent capital and profits interest in X. Z owns an interest in X that represents a 40 percent capital and profits interest. Under State W law, Z merges into X. Pursuant to such law, the following events occur simultaneously at the effective time of the transaction: all of the assets and liabilities of Z become the assets and liabilities of X and Z ceases its separate legal existence for all purposes. In the merger, the Z shareholders exchange their stock of Z for stock of Y. As a result of the merger, X becomes an entity that is disregarded as an entity separate from Y for Federal income tax purposes.

(ii) *Analysis.* The transaction satisfies the requirements of paragraph (b)(1)(ii) of this section because the transaction is effected pursuant to State W law and the following events occur simultaneously at the effective time of the transaction: all of the assets and liabilities of Z, the combining entity and sole member of the transferor unit, become the assets and liabilities of one or more members of the transferee unit that is comprised of Y, the combining entity of the transferee unit, and X, a disregarded entity the assets of which Y is treated as owning for Federal income tax purposes immediately after the transaction, and Z ceases its separate legal existence for all purposes. Accordingly, the transaction qualifies as a statutory merger or consolidation for purposes of section 368(a)(1)(A).

Example 12. State law consolidation. (i) *Facts.* Under State W law, Z and V consolidate. Pursuant to such law, the following events occur simultaneously at the effective time of the transaction: all of the assets and liabilities of Z and V become the assets and liabilities of Y, an entity that is created in the transaction, and the existence of Z and V continues in Y. In the consolidation, the Z shareholders and the V shareholders exchange their stock of Z and V, respectively, for stock of Y.

(ii) *Analysis.* With respect to each of Z and V, the transaction satisfies the requirements of paragraph (b)(1)(ii) of this section because the transaction is effected pursuant to State W law and the following events occur simultaneously at the effective time of the transaction: all of the assets and liabilities of Z and V, respectively, each of which is the combining entity of a transferor unit, become the assets and liabilities of Y, the combining entity and sole member of the transferee unit, and Z and V each ceases its separate legal existence for all purposes. Accordingly, the transaction qualifies as the statutory merger or consolidation of each of Z and V into Y for purposes of section 368(a)(1)(A).

Example 13. Transaction effected pursuant to foreign statutes. (i) *Facts.* Z and Y are entities organized under the laws of Country Q and classified as corporations for Federal income tax purposes. Z and Y combine. Pursuant to statutes of Country Q the following events occur simultaneously: all of the assets and liabilities of Z become the assets and liabilities of Y and Z's separate legal existence ceases for all purposes.

(ii) *Analysis.* The transaction satisfies the requirements of paragraph (b)(1)(ii) of this section because the transaction is effected pursuant to statutes of Country Q and the following events occur simultaneously at the effective time of the transaction: all of the assets and liabilities of Z, the combining entity of the transferor unit, become the assets and liabilities of Y, the combining entity and sole member of the transferee unit, and Z ceases its separate legal existence for all purposes. Accordingly, the transaction qualifies as a statutory merger or consolidation for purposes of section 368(a)(1)(A).

Example 14. Foreign law amalgamation using parent stock. (i) *Facts.* Z and V are entities organized under the laws of Country Q and classified as corporations for Federal income tax purposes. Z and V amalgamate. Pursuant to statutes of Country Q, the following events occur simultaneously: all the assets and liabilities of Z and V become the assets and liabilities of R, an entity that is created in the transaction and that is wholly owned by Y immediately after the transaction, and Z's and V's separate legal existences cease for all purposes. In the transaction, the Z and V shareholders exchange their Z and V stock, respectively, for stock of Y.

(ii) *Analysis.* With respect to each of Z and V, the transaction satisfies the requirements of paragraph (b)(1)(ii) of this section because the transaction is effected pursuant to Country Q law and the following events occur simultaneously at the effective time of the transaction: all of the assets and liabilities of Z and V, respectively, each of which is the combining entity of a transferor unit, become the assets and liabilities of R, the combining entity and sole member of the transferee unit, with regard to each of the above transfers, and Z and V each ceases its separate legal existence for all purposes. Because Y is in control of R immediately after the transaction, the Z shareholders and the V shareholders will be treated as receiving stock of a corporation that is in control of R, the combining entity of the transferee unit that is the acquiring corporation for purposes of section 368(a)(2)(D). Accordingly, the transaction qualifies as the statutory merger or consolidation of each of Z and V into R, a corporation controlled by Y, and is a reorganization under section 368(a)(1)(A) by reason of section 368(a)(2)(D).

(v) *Effective date.* This paragraph (b)(1) applies to transactions occurring on or after January 23, 2006. For rules regarding statutory mergers or consolidation occurring before January 23, 2006, see § 1.368–2T as contained in 26 CFR part 1, revised April 1, 2005, and § 1.368–2(b)(1) as in effect before January 24, 2003 (*see* 26 CFR part 1, revised April 1, 2002).

* * * * *

§ 1.368–2T [Removed]

■ **Par. 3.** Section 1.368–2T is removed.

Mark E. Matthews,

Deputy Commissioner for Services and Enforcement.

Approved: January 17, 2006.

Eric Solomon,

Acting Deputy Assistant Secretary of the Treasury (Tax Policy).

[FR Doc. 06–588 Filed 1–23–06; 11:43 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9244]

RIN 1545–BC05; 1545–BE88

Determination of Basis of Stock or Securities Received in Exchange for, or With Respect to, Stock or Securities in Certain Transactions; Treatment of Excess Loss Accounts

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final and temporary regulations.

SUMMARY: This document contains final regulations under section 358 that provide guidance regarding the determination of the basis of stock or securities received in exchange for, or with respect to, stock or securities in certain transactions. This document also contains temporary regulations under section 1502 that govern certain basis determinations and adjustments of subsidiary stock in certain transactions involving members of a consolidated group. The text of the temporary regulations also serves as the text of the proposed regulations set forth in the notice of proposed rulemaking on this subject in the Proposed Rules section in this issue of the **Federal Register**. The final and temporary regulations affect shareholders of corporations.

DATES: *Effective Date:* The final and temporary regulations are effective on January 23, 2006.

Applicability Dates: Section 1.1502–19T applies to adjustments and determinations of basis of (including an excess loss account in) the stock of a member occurring on or after January 23, 2006. The applicability of §1.1502–19T will expire on January 23, 2009.

FOR FURTHER INFORMATION CONTACT: Theresa M. Kolish, (202) 622–7530 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

Section 358(a)(1) of the Internal Revenue Code (Code) generally provides that the basis of property received pursuant to an exchange to which section 351, 354, 355, 356, or 361 applies is the same as that of the property exchanged, decreased by the fair market value of any other property (except money) received by the taxpayer, the amount of any money received by the taxpayer, and the amount of loss to the taxpayer which was recognized on such exchange, and increased by the amount which was treated as a dividend, and the amount of gain to the taxpayer which was recognized on such exchange (not including any portion of such gain which was treated as a dividend). Section 358(b)(1) provides that, under regulations prescribed by the Secretary, the basis determined under section 358(a)(1) must be allocated among the properties received in the exchange or distribution.

On May 3, 2004, the IRS and Treasury Department published a notice of proposed rulemaking (REG–116564–03) in the **Federal Register** (69 FR 24107) that included regulations under section 358 (the proposed regulations) providing guidance regarding the determination of the basis of shares or securities received in a reorganization described in section 368 and a distribution to which section 355 applies. The proposed regulations adopt a tracing method pursuant to which the basis of each share of stock or security received in a reorganization under section 368 is traced to the basis of each surrendered share of stock or security, and each share of stock or security received in a distribution under section 355 is allocated basis from a share of stock or security of the distributing corporation. In the course of developing the proposed regulations, the IRS and Treasury Department considered whether a tracing method or an averaging method should be used to determine the basis of stock and securities received in such transactions. The proposed regulations' adoption of the tracing method is based on the view of the IRS and Treasury Department that, in light of the carryover basis rule of section 358, a reorganization is not an event that justifies averaging the bases of exchanged stock or securities that have been purchased at different times and at different prices. Moreover, the adoption of the tracing method reflects the concern of the IRS and Treasury Department that averaging the bases of exchanged blocks of stock or securities may inappropriately limit the ability of taxpayers to arrange their affairs and may afford opportunities for the avoidance of certain provisions of the Code.

Under the proposed regulations, the basis of each share of stock or security received in an exchange to which section 354, 355, or 356 applies is generally the same as the basis of the share or shares of stock or security or securities exchanged therefor. In the case of a distribution to which section 355 applies, the proposed regulations provide that the basis of each share of stock or security of the distributing corporation is allocated between the share of stock or security of the distributing corporation and the share of stock or security received with respect to such share of stock or security of the distributing corporation in proportion to their fair market values.

If a shareholder or security holder is unable to identify which particular share (or portion of a share) of stock or security is exchanged for, or received with respect to, a particular share (or portion of a share) of stock or security, the proposed regulations permit the shareholder or security holder to designate which share or security is received in exchange for, or in respect of, which share or security. Such designation, however, must be consistent with the terms of the exchange or distribution and must be made on or before the first date on which the basis of a share or security received is relevant, for example, the date on which a share or security received is sold, or is transferred in an exchange described in section 351 or section 721 or a reorganization described in section 368.

No public hearing regarding the proposed regulations was requested or held. However, several written and electronic comments regarding the proposed regulations were received. After consideration of the comments, the proposed regulations are adopted as amended by this Treasury decision.

Explanation of Provisions

These final regulations retain the tracing method of the proposed regulations, but make several modifications to the proposed regulations in response to the comments received. The following paragraphs describe the most significant comments received and the extent to which they have been incorporated into these final and temporary regulations.

A. Allocation of Consideration Received

As described above, in certain cases, the proposed regulations permit a shareholder to designate which share or security is received in exchange for, or with respect to, which share or security, provided that the designation is consistent with the terms of the exchange or distribution. One commentator observed that in certain cases in which more than one class of stock or securities is received in exchange for more than one block of stock, more than one designation may be consistent with the terms of the exchange. For example, suppose that A owns two blocks of 100 shares of Corporation X common stock. Each block has a value of $100. A has an

aggregate basis of $50 in one block and an aggregate basis of $250 in the other block. Pursuant to the terms of a reorganization, A transfers both blocks in exchange for 100 shares of Corporation Y common stock with a value of $100 and 100 shares of Corporation Y preferred stock with a value of $100. Under the proposed regulations, A's designation could reflect that each of the Corporation Y common stock and the Corporation Y preferred stock are allocated to the shares exchanged in proportion to their fair market values. Therefore, Corporation Y common stock with a fair market value of $50 and Corporation Y preferred stock with a fair market value of $50 would be treated as received for each block of Corporation X common stock. Alternatively, A's designation could reflect that the low basis Corporation X shares were exchanged for Corporation Y common stock and the high basis Corporation X shares were exchanged for Corporation Y preferred stock or vice versa. Other designations would also seemingly be permitted under the proposed regulations. The commentator requested clarification regarding whether these designations would, in fact, be permitted.

The IRS and Treasury Department have considered the extent to which taxpayers should be permitted to designate which type of consideration is received in exchange for particular shares of stock or securities when more than one designation is consistent with the terms of the exchange. The IRS and Treasury Department believe that this issue is likely to arise only in cases in which the target corporation is closely held. In these cases, the shareholders will likely have the ability to control the terms of the exchange. These final regulations confirm that, to the extent the terms of the exchange specify which shares of stock or securities are received in exchange for a particular share of stock or security or a particular class of stock or securities, provided that such terms are economically reasonable, such terms will control for purposes of determining the basis of the stock or securities received. In addition, these final regulations provide that, to the extent the terms of the exchange do not specify which shares of stock or securities are received in exchange for a particular share of stock or security or a particular class of stock or securities, a pro rata portion of the shares of stock and securities of each class received is treated as received in exchange for each share of stock and security surrendered, based on the fair market value of the surrendered stock and securities. The final regulations also include similar rules that apply to distributions under section 355.

B. Allocation of Boot Received

A number of commentators requested guidance regarding the proper method for allocating boot among the stock and securities surrendered in an exchange or the stock and securities with respect to which a distribution is made. An allocation of boot may be necessary to compute the taxpayer's gain recognized in connection with a transaction and, therefore, its basis in stock and securities received. One commentator suggested that a facts and circumstances analysis (presumably one that examines the terms of the exchange) should be used to determine what nonrecognition property received in an exchange is allocable to particular shares or securities surrendered. In cases in which the facts and circumstances do not suggest a particular allocation, the commentator suggested that the boot should be allocated pro rata among the surrendered stock and securities. For example, suppose A holds 100 shares of Corporation T common stock and 100 shares of Corporation T preferred stock. The common shares have an aggregate basis of $10 and an aggregate fair market value of $100 and the preferred shares have an aggregate basis of $20 and an aggregate fair market value of $100. Corporation T merges with and into Corporation X in a reorganization under section 368. In the reorganization, A exchanges its shares of Corporation T common and preferred stock for 100 shares of Corporation X common stock with an aggregate fair market value of $100 and $100 of cash. If the cash were allocated proportionately between the common and preferred shares based on their relative values, A would recognize $50 of gain on its common shares and $50 of gain on its preferred shares. If the cash were allocated solely to the common shares, A would recognize $90 of gain. If the cash were allocated solely to the preferred shares, A would recognize $80 of gain.

These final regulations adopt rules governing the allocation of boot among stock and securities surrendered (or with respect to which a distribution is made) that are consistent with those rules described above regarding designations of exchanges and distributions when more than one class of stock or securities is received in exchange for, or received with respect to, more than one block of stock. In particular, this Treasury decision includes regulations under section 356 that provide that, for purposes of computing the gain, if any, recognized on an exchange, to the extent the terms of the exchange specify the other property or money that is received in exchange for a particular share of stock or security surrendered, provided that such terms are economically reasonable, such terms control. This position is consistent with the conclusions reached in Revenue Ruling 74–515, 1974–2 C.B. 118 (suggesting that, for purposes of computing gain recognized under section 356 in the context of an exchange the terms of which provided for the exchange of common stock for common stock and preferred stock for cash, the terms of the exchange governed). To the extent the terms of the exchange do not specify the other property or money that is received in exchange for a particular share of stock or security surrendered, a pro rata portion of the other property and money received is treated as received in exchange for each share of stock and security surrendered, based on the fair market value of such surrendered share of stock or security.

The IRS and Treasury Department are aware that there is a question as to the proper treatment of the basis of stock exchanged for boot in the following circumstances. This question arises, in part, as a result of the operation of section 356. Section 356 generally applies if section 354 would apply to an exchange but for the fact that the property received in the exchange consists not only of property permitted by section 354 to be received without the recognition of gain but also of other property or money. Section 356(c) provides that no loss realized from such an exchange may be recognized.

Suppose A holds 100 shares of Corporation T common stock and 100 shares of Corporation T preferred stock. The common shares have an aggregate basis of $10 and an aggregate fair market value of $100 and the preferred shares have an aggregate basis of $150 and an aggregate fair market value of $100. Corporation T merges with and into Corporation X in a reorganization under section 368. The terms of the exchange specify that A exchanges its shares of Corporation T common stock for 100 shares of Corporation X common stock with an aggregate fair market value of $100 and exchanges its shares of Corporation T preferred stock for $100 of cash. Under these final regulations, the terms of the exchange control for purposes of determining gain under section 356 and basis under section 358. Under section 356(c), A realizes a gain of $90 on the exchange of Corporation T common stock for Corporation X common stock, none of which is

recognized under section 356 and A takes an aggregate basis of $10 in the shares of Corporation X common stock received in the exchange. However, A realizes a loss of $50 on the exchange of Corporation T preferred stock for cash. Therefore, A would not be entitled to recognize any of the loss realized. This conclusion is consistent with Revenue Ruling 74–515. In that ruling, a shareholder surrenders common stock of the target corporation in exchange for common stock of the acquiring corporation and preferred stock of the target corporation in exchange for cash. The ruling concludes that the tax consequences of the shareholder's exchange of preferred shares for cash are governed by section 356 and any loss realized is not recognized by reason of section 356(c).

The IRS and Treasury Department are considering, and request comments regarding, whether regulations should be adopted interpreting section 356 in a manner that would permit a taxpayer, such as A, in the circumstances described above to recognize the loss in these types of fact patterns. If an approach permitting recognition of loss in these cases is not adopted, then an issue arises as to the proper treatment of the basis of the shares with respect to which the loss is realized but not recognized, at least to the extent that such basis exceeds the cash received in respect of such shares. The IRS and Treasury Department request comments on the proper treatment of such basis.

C. Retained Shares of Stock or Securities in Section 355 Exchanges

As described above, the proposed regulations provide that the basis of each share of stock or security received in an exchange to which section 355 applies is generally the same as the basis of the share or shares of stock or security or securities exchanged therefor. This rule applies even if the exchanging shareholder or security holder retains shares of stock or securities in the distributing corporation. If the shareholder or security shareholder retains shares of stock or securities in the distributing corporation, the basis of those instruments remains unaffected. One commentator suggested that this approach might be viewed as inconsistent with the statutory language of section 358(b)(2).

Section 358(b)(2) generally provides that in allocating basis among the property permitted to be received without the recognition of gain or loss in an exchange to which section 355 applies, there shall be taken into account not only the property so permitted to be received without the recognition of gain or loss, but also the stock or securities (if any) of the distributing corporation that are retained and the allocation of basis must be made among all such properties. Neither the statutory language of section 358(b)(2) nor its legislative history indicates the method of allocation that Congress contemplated when it enacted this provision.

The IRS and Treasury Department believe that the rule of the proposed regulations is a reasonable approach to the implementation of section 358(b)(2). Nonetheless, the IRS and Treasury Department did consider alternative approaches.

For example, the IRS and Treasury Department considered adopting an approach that would aggregate the basis of the shares of stock and securities of the distributing corporation owned by a particular shareholder and then would allocate such basis among the shares of stock and securities in the distributing and controlled corporations owned by that shareholder immediately after the distribution based on their fair market values. Such an approach would effectively be an averaging approach for certain types of exchanges, an approach that is inconsistent with the view that a reorganization is not an event that justifies averaging the bases of exchanged stock that had been purchased at different times and at different prices and that would result in the inconsistent treatment of exchanges under section 354, 355, and 356.

The IRS and Treasury Department also considered adopting an approach that would have treated the shareholder or security holder as receiving a distribution of stock or securities on each share of stock or security that it owned in the distributing corporation, followed by a recapitalization of both the distributing and controlled corporations to reflect the shareholders' and security holders' actual stock and security ownership immediately after the transaction. The IRS and Treasury Department, however, were concerned that this approach would be complex and inadministrable, especially in cases in which a shareholder holds stock of the distributing corporation in multiple accounts.

For the reasons described above, these two alternative approaches were rejected. Therefore, these final regulations do not alter the operation of the rules of the proposed regulations in this context.

D. Stockless Reorganizations

A number of commentators observed that it is not clear how basis should be determined in the case of a reorganization in which no stock is issued. Such a situation may arise in reorganizations involving commonly controlled acquiring and target corporations where the issuance of additional stock of the acquiring corporation would constitute a meaningless gesture. One commentator suggested an approach that would treat the acquiring corporation as issuing an amount of stock equal to the fair market value of the stock surrendered. The basis of that deemed issued stock would have a basis traced from the shares surrendered in the reorganization under the rules that would have applied had the shareholder actually received such stock. Then, the shareholder's stock in the acquiring corporation would be treated as recapitalized. In the recapitalization, the shareholder would be treated as surrendering all of its shares of the acquiring corporation, including those shares owned immediately prior to the reorganization and those shares the shareholder is deemed to receive, in exchange for the shares that the shareholder actually holds immediately after the reorganization. The basis of the shares that the shareholder actually owns would be determined under the rules that would have applied had the recapitalization actually occurred with respect to the shareholder's actual shares and the shares the shareholder is deemed to have received.

For example, suppose P wholly owns S1 and S2. P owns 100 shares of S1, each of which has a basis of $1 and was acquired on Date 1, and 100 shares of S2, each of which has a basis of $2 and was acquired on Date 2. The fair market value of each share of the stock of each of S1 and S2 is $1. S1 merges into S2 in a reorganization under section 368(a)(1)(D) in which P does not receive any additional stock of S2. Under the suggested approach, P would be treated as receiving 100 shares of S2, each of which has a fair market value of $1. The basis of those additional 100 shares would be determined as if P had actually received those shares. Therefore, each of those shares would have a basis of $1. Then, to reflect that P has only 100 shares of S2 stock rather than 200 shares, S2 would be treated as undergoing a reverse stock split in which it exchanges two shares of its stock for one share. The basis of each of the 100 shares would be determined as if the reverse stock split had actually occurred. Therefore, 50 shares of P's S2 stock would each have a basis of $2 and would be treated as having been acquired on Date 1 and the remaining 50

shares of P's S2 stock would each have a basis of $4 and would be treated as having been acquired on Date 2.

The IRS and Treasury Department believe that the approach suggested is consistent with the general tracing approach of the proposed regulations. Accordingly, these final regulations adopt the suggested approach for cases in which a shareholder of the target corporation receives no property or property with a fair market value less than that of the stock or securities the shareholder surrendered in the transaction.

E. Single Versus Split Basis Approaches

The proposed regulations provide that if one share of stock or security is received in exchange for, or with respect to, more than one share of stock or security or a fraction of a share of stock or security is received, the basis of the shares of surrendered stock or securities must be allocated to the shares of stock or securities received in a manner that reflects, to the greatest extent possible, that a share of stock or security received is received in exchange for, or with respect to, shares of stock or securities that were acquired on the same date and at the same price. The preamble states that this rule avoids, to the greatest extent possible, creating shares of stock or securities with split holding periods. Several commentators have requested guidance regarding whether a share that reflects the basis of several shares with differing bases has a single, aggregated basis or a split basis. For example, suppose B has two shares of stock of T. One of those shares has a basis of $1 and was acquired on Date 1. The other share has a basis of $2 and was acquired on Date 2. A, a corporation, acquires the assets of T in a reorganization under section 368(a)(1)(A). In the reorganization, B exchanges its two shares of T stock for one share of A stock. One possibility is that B has a single, undivided $3 basis in its share of A stock. Another possibility is that B has a split basis in its share of A stock such that half of the share is treated as having a basis of $1 and the other half is treated as having a basis of $2.

The IRS and Treasury Department believe that because the single, aggregated basis approach has the effect of averaging the basis of more than one share, it is inconsistent with the tracing regime adopted in these final regulations. Moreover, as suggested in the preamble of the proposed regulations, the IRS and Treasury Department believe that it is possible for a share to have a split holding period. The IRS and Treasury Department believe that the split basis approach is a logical corollary to the split holding period approach. Therefore, these final regulations reflect that a share may have not only a split holding period, but also a split basis.

F. Coordination with Section 1036

Section 1036 provides that no gain or loss is recognized if common stock is exchanged for common stock, or preferred stock is exchanged for preferred stock, in the same corporation. Section 1031 provides rules for determining the basis of the common or preferred stock received in an exchange described in section 1036. One commentator requested clarification regarding whether the basis tracing rules of the proposed regulations apply to transactions governed by both section 1036 and section 354 or 356.

The IRS and Treasury Department believe that those same policies that support the application of a tracing regime in the context of transactions governed solely by section 354 or 356 support the application of a tracing regime in the context of transactions governed by both section 1036, on the one hand, and section 354 or 356, on the other hand. Accordingly, these final regulations provide that the tracing rules apply to determine the basis of a share of stock or security received by a shareholder or security holder in an exchange described in both section 1036, on the one hand, and section 354 or section 356, on the other hand. The IRS and Treasury Department continue to study whether the rules of these final regulations should be adopted in regulations under section 1036 for transactions governed by section 1036, but not section 354 or 356.

G. Application of Tracing Rules to Section 351 Transactions

Under the proposed regulations, the tracing rules do not apply to an exchange described in section 351, unless such exchange is also described in section 354 or section 356 and certain other requirements are satisfied. One commentator urged the IRS and Treasury Department to consider expanding the tracing regime of the proposed regulations to apply more broadly to exchanges governed by section 351. That commentator suggested that having different regimes apply to the determination of the basis of stock received in a tax-free exchange for stock is undesirable.

The IRS and Treasury Department are continuing to study the possible application of a tracing approach more broadly to exchanges described in section 351. In the meantime, these final regulations retain those limitations on the application of the basis tracing regime to exchanges described in section 351 that were included in the proposed regulations.

H. Excess Loss Accounts

Section 1.1502–19(d) provides that if a member (P) of a consolidated group has an excess loss account in shares of a class of another member's (S's) stock at the time of a basis adjustment or determination under the Internal Revenue Code with respect to other shares of the same class of S's stock owned by the member, the adjustment or determination is allocated first to equalize and eliminate that member's excess loss account. The rule reflects a policy of permitting the elimination of excess loss accounts. The application of the rule, however, is sensitive to the form of the transaction. For example, if P owns all of the stock of S with an excess loss account of $100 and all of the stock of T with a basis of $150, and T merges into S in a reorganization under section 368(a)(1)(D) in which P receives additional shares of S stock, under § 1.1502–19(d), P's excess loss account in its original shares of S stock is first eliminated. Therefore, P's original S shares will have an aggregate basis of $0 and P's new S shares will have an aggregate basis of $50. If, instead, however, S merges into T in a reorganization under section 368(a)(1)(D) in which P receives additional shares of T stock, because P does not already have T shares that have an excess loss account, § 1.1502–19(d) does not apply. Therefore, P's original T shares will have a basis of $150 and P's new T shares will have an excess loss account of $100.

The limitation on the application of § 1.1502–19(d) to cases in which a basis adjustment or determination is made with respect to shares of a class of stock of the corporation in which the member holds other shares with an excess loss account effectively makes the rule elective. That is, if the transaction occurs in one direction (in the example above, T merges into S), the rule applies. If the transaction occurs in the other direction (in the example above, S merges into T), the rule does not apply. The IRS and Treasury Department believe that this electivity is undesirable. Therefore, the IRS and Treasury Department believe that it is appropriate to expand the scope of the application of the rule of § 1.1502–19(d). Accordingly, the temporary regulations included in this Treasury decision add an additional rule to § 1.1502–19 that provides that if a member would otherwise determine shares of a class of S's stock (a new share) to have an excess

loss account and such member owns one or more other shares of the same class of S's stock, the basis of such other shares is allocated to eliminate and equalize any excess loss account that would otherwise be in the new shares. Therefore, in the example above where S merges into T in a reorganization under section 368(a)(1)(D) in which P receives additional shares of T stock, the basis of P's original T shares will first be applied to eliminate the excess loss account that P would otherwise have in its new T shares. Therefore, P will have an aggregate basis of $50 in its original T shares and an aggregate basis of $0 in its new T shares.

Effective Date

The final and temporary regulations apply to exchanges and distributions of stock or securities and determinations of stock basis occurring on or after the date these regulations are filed as final regulations in the **Federal Register**.

Effect on Other Documents

The following publication is obsolete as of January 23, 2006:

Revenue Ruling 55–355 (1955–1 C.B. 418).

Special Analyses

It has been determined that the final regulations issued with respect to section 358 and section 1502 are not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C chapter 5) does not apply to these regulations, and, because the regulations do not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Code, the notice of proposed rulemaking preceding these regulations was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

It has been determined that the temporary regulations issued with respect to section 1502 are not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. These temporary regulations are necessary to provide taxpayers with immediate guidance regarding the application of section 358 when a member of a consolidated group has an excess loss account in the stock of another member and consequences of such application. Accordingly, good cause is found for dispensing with notice and public procedure pursuant to 5 U.S.C. 553(b)(B) and with a delayed effective date pursuant to 5 U.S.C. 553(d)(3). For applicability of the Regulatory Flexibility Act, please refer to the cross-reference notice of proposed rulemaking published elsewhere in the **Federal Register**. Pursuant to section 7805(f) of the Code, these temporary regulations will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small business.

Drafting Information

The principal authors of these regulations are Emidio J. Forlini, Jr. and Theresa M. Kolish of the Office of the Associate Chief Counsel (Corporate), IRS. However, other personnel from the IRS and the Treasury Department participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

■ Accordingly, 26 CFR part 1 is amended as follows:

PART 1—INCOME TAXES

■ **Paragraph 1.** The authority citation for part 1 is amended by adding an entry in numerical order to read, in part, as follows:

Authority: 26 U.S.C. 7805 * * *

Section 1.358–2 also issued under 26 U.S.C. 358. * * *

Section 1.1502–19T also issued under 26 U.S.C. 1502. * * *

Section 1.1502–32 also issued under 26 U.S.C. 1502. * * *

■ **Par. 2.** Section 1.356–1 is revised to read as follows:

§ 1.356–1 Receipt of additional consideration in connection with an exchange.

(a) If in any exchange to which the provisions of section 354 or section 355 would apply except for the fact that there is received by the shareholders or security holders other property (in addition to property permitted to be received without recognition of gain by such sections) or money, then—

(1) The gain, if any, to the taxpayer shall be recognized in an amount not in excess of the sum of the money and the fair market value of the other property, but,

(2) The loss, if any, to the taxpayer from the exchange or distribution shall not be recognized to any extent.

(b) For purposes of computing the gain, if any, recognized pursuant to section 356 and paragraph (a)(1) of this section, to the extent the terms of the exchange specify the other property or money that is received in exchange for a particular share of stock or security surrendered or a particular class of stock or securities surrendered, such terms shall control provided that such terms are economically reasonable. To the extent the terms of the exchange do not specify the other property or money that is received in exchange for a particular share of stock or security surrendered or a particular class of stock or securities surrendered, a pro rata portion of the other property and money received shall be treated as received in exchange for each share of stock and security surrendered, based on the fair market value of such surrendered share of stock or security.

(c) If the distribution of such other property or money by or on behalf of a corporation has the effect of the distribution of a dividend, then there shall be chargeable to each distributee (either an individual or a corporation)—

(1) As a dividend, such an amount of the gain recognized as is not in excess of the distributee's ratable share of the undistributed earnings and profits of the corporation accumulated after February 28, 1913, and

(2) As a gain from the exchange of property, the remainder of the gain so recognized.

(d) The rules of this section may be illustrated by the following examples:

Example 1. In an exchange to which the provisions of section 356 apply and to which section 354 would apply but for the receipt of property not permitted to be received without the recognition of gain or loss, A (either an individual or a corporation), received the following in exchange for a share of stock having an adjusted basis to A of $85:

One share of stock worth	$100
Cash	25
Other property (basis $25) fair market value	50
Total fair market value of consideration received	175
Adjusted basis of stock surrendered in exchange	85

Total gain	90
Gain to be recognized, limited to cash and other property received	75
A's pro rata share of earnings and profits accumulated after February 28, 1913 (taxable dividend)	30
Remainder to be treated as a gain from the exchange of property	45

Example 2. If, in *Example 1,* A's stock had an adjusted basis to A of $200, A would have realized a loss of $25 on the exchange, which loss would not be recognized.

Example 3. (i) *Facts.* J, an individual, acquired 10 shares of Class A stock of Corporation X on Date 1 for $3 each and 10 shares of Class B stock of Corporation X on Date 2 for $9 each. On Date 3, Corporation Y acquires the assets of Corporation X in a reorganization under section 368(a)(1)(A). Pursuant to the terms of the plan of reorganization, J surrenders all of J's shares of Corporation X stock for 10 shares of Corporation Y stock and $100 of cash. On the date of the exchange, the fair market value of each share of Class A stock of Corporation X is $10, the fair market value of each share of Class B stock of Corporation X is $10, and the fair market value of each share of Corporation Y stock is $10. The terms of the exchange do not specify that shares of Corporation Y stock or cash are received in exchange for particular shares of Class A stock or Class B stock of Corporation X.

(ii) *Analysis.* Under paragraph (b) of this section, because the terms of the exchange do not specify that the cash is received in exchange for shares of Class A or Class B stock of Corporation X, a pro rata portion of the cash received is treated as received in exchange for each share of Class A stock of Corporation X and each share of Class B stock of Corporation X based on the fair market value of the surrendered shares. Therefore, J is treated as receiving shares of Corporation Y stock with a fair market value of $50 and $50 of cash in exchange for its shares of Class A stock of Corporation X and shares of Corporation Y stock with a fair market value of $50 and $50 of cash in exchange for its shares of Class B stock of Corporation X. J realizes a gain of $70 on the exchange of shares of Class A stock, $50 of which is recognized under section 356 and paragraph (a) of this section, and J realizes a gain of $10 on the exchange of shares of Class B stock of Corporation X, all of which is recognized under section 356 and paragraph (a) of this section. Assuming that J's gain recognized is not treated as a dividend under section 356(a)(2), such gain shall be treated as gain from the exchange of property.

Example 4. (i) *Facts.* The facts are the same as in *Example 3,* except that the terms of the plan of reorganization specify that J receives 10 shares of stock of Corporation Y in exchange for J's shares of Class A stock of Corporation X and $100 of cash in exchange for J's shares of Class B stock of Corporation X.

(ii) *Analysis.* Under paragraph (b) of this section, because the terms of the exchange specify that J receives 10 shares of stock of Corporation Y in exchange for J's shares of Class A stock of Corporation X and $100 of cash in exchange for J's shares of Class B stock of Corporation X and such terms are economically reasonable, such terms control. J realizes a gain of $70 on the exchange of shares of Class A stock, none of which is recognized under section 356 and paragraph (a) of this section, and J realizes a gain of $10 on the exchange of shares of Class B stock of Corporation X, all of which is recognized under section 356 and paragraph (a) of this section.

(e) Section 301(b)(1)(B) and section 301(d)(2) do not apply to a distribution of ''other property'' to a corporate shareholder if such distribution is within the provisions of section 356.

(f) See paragraph (l) of §1.301–1 for certain transactions which are not within the scope of section 356.

(g) This section applies to exchanges and distributions of stock and securities occurring on or after January 23, 2006.

■ **Par. 3.** Section 1.358–1 is revised to read as follows:

§ 1.358–1 Basis to distributees.

(a) In the case of an exchange to which section 354 or 355 applies in which, under the law applicable to the year in which the exchange is made, only nonrecognition property is received, immediately after the transaction, the sum of the basis of all of the stock and securities received in the transaction shall be the same as the basis of all the stock and securities in such corporation surrendered in the transaction, allocated in the manner described in §1.358–2. In the case of a distribution to which section 355 applies in which, under the law applicable to the year in which the distribution is made, only nonrecognition property is received, immediately after the transaction, the sum of the basis of all of the stock and securities with respect to which the distribution is made plus the basis of all stock and securities received in the distribution with respect to such stock and securities shall be the same as the basis of the stock and securities with respect to which the distribution is made immediately before the transaction, allocated in the manner described in §1.358–2. In the case of an exchange to which section 351 or 361 applies in which, under the law applicable to the year in which the exchange was made, only nonrecognition property is received, the basis of all the stock and securities received in the exchange shall be the same as the basis of all property exchanged therefor. If in an exchange or distribution to which section 351, 356, or 361 applies both nonrecognition property and ''other property'' are received, the basis of all the property except ''other property'' held after the transaction shall be determined as described in the preceding three sentences decreased by the sum of the money and the fair market value of the ''other property'' (as of the date of the transaction) and increased by the sum of the amount treated as a dividend (if any) and the amount of the gain recognized on the exchange, but the term gain as here used does not include any portion of the recognized gain that was treated as a dividend. In any case in which a taxpayer transfers property with respect to which loss is recognized, such loss shall be reflected in determining the basis of the property received in the exchange. The basis of the ''other property'' is its fair market value as of the date of the transaction. See §1.460–4(k)(3)(iv)(A) for rules relating to stock basis adjustments required where a contract accounted for using a long-term contract method of accounting is transferred in a transaction described in section 351 or a reorganization described in section 368(a)(1)(D) with respect to which the requirements of section 355 (or so much of section 356 as relates to section 355) are met.

(b) The application of paragraph (a) of this section may be illustrated by the following example:

Example. A purchased a share of stock in Corporation X in 1935 for $150. Since that date A has received distributions out of other than earnings and profits (as defined in section 316) totaling $60, so that A's adjusted basis for the stock is $90. In a transaction qualifying under section 356, A exchanged this share for one share in Corporation Y, worth $100, cash in the amount of $10, and other property with a fair market value of $30. The exchange had the effect of the distribution of a dividend. A's ratable share of the earnings and profits of Corporation X accumulated after February 28, 1913, was $5. A realized a gain of $50 on the exchange, but the amount recognized is limited to $40, the sum of the cash received and the fair market value of the other property. Of the gain recognized, $5 is taxable as a dividend, and $35 is taxable as a gain from the exchange of property. The basis to A of the one share of stock of Corporation Y is $90. That is, the adjusted basis of the one share of stock Corporation X ($90), decreased by the sum of the cash received ($10) and the fair market

value of the other property received ($30) and increased by the sum of the amount treated as a dividend ($5) and the amount treated as a gain from the exchange of property ($35). The basis of the other property received is $30.

(c) This section applies to exchanges and distributions of stock and securities occurring on or after January 23, 2006.

■ **Par. 4.** Section 1.358–2 is amended by:

■ 1. Revising paragraphs (a)(1) and (a)(2).

■ 2. Removing paragraphs (a)(3), (a)(4), and (a)(5).

■ 3. Revising paragraphs (b)(1) and (c).

■ 4. Adding paragraph (d).

The revisions and addition read as follows:

§ 1.358–2 Allocation of basis among nonrecognition property.

(a) *Allocation of basis in exchanges or distributions to which section 354, 355, or 356 applies.* (1) As used in this paragraph the term *stock* means stock which is not ''other property'' under section 356. The term *securities* means securities (including, where appropriate, fractional parts of securities) which are not ''other property'' under section 356. Stock, or securities, as the case may be, which differ either because they are in different corporations or because the rights attributable to them differ (although they are in the same corporation) are considered different classes of stock or securities, as the case may be, for purposes of this section.

(2)(i) If a shareholder or security holder surrenders a share of stock or a security in an exchange under the terms of section 354, 355, or 356, the basis of each share of stock or security received in the exchange shall be the same as the basis of the share or shares of stock or security or securities (or allocable portions thereof) exchanged therefor (as adjusted under § 1.358–1). If more than one share of stock or security is received in exchange for one share of stock or one security, the basis of the share of stock or security surrendered shall be allocated to the shares of stock or securities received in the exchange in proportion to the fair market value of the shares of stock or securities received. If one share of stock or security is received in exchange for more than one share of stock or security or if a fraction of a share of stock or security is received, then the basis of the shares of stock or securities surrendered must be allocated to the shares of stock or securities (or allocable portions thereof) received in a manner that reflects, to the greatest extent possible, that a share of stock or security received is received in respect of shares of stock or securities that were acquired on the same date and at the same price. To the extent it is not possible to allocate basis in this manner, the basis of the shares of stock or securities surrendered must be allocated to the shares of stock or securities (or allocable portions thereof) received in a manner that minimizes the disparity in the holding periods of the surrendered shares of stock or securities whose basis is allocated to any particular share of stock or security received.

(ii) If a shareholder or security holder surrenders a share of stock or a security in an exchange under the terms of section 354, 355, or 356, and receives shares of stock or securities of more than one class, or receives ''other property'' or money in addition to shares of stock or securities, then, to the extent the terms of the exchange specify that shares of stock or securities of a particular class or ''other property'' or money is received in exchange for a particular share of stock or security or a particular class of stock or securities, for purposes of applying the rules of this section, such terms shall control provided such terms are economically reasonable. To the extent the terms of the exchange do not specify that shares of stock or securities of a particular class or ''other property'' or money is received in exchange for a particular share of stock or security or a particular class of stock or securities, then, for purposes of applying the rules of paragraph (a)(2)(i) of this section, a pro rata portion of the shares of stock and securities of each class received and a pro rata portion of the ''other property'' and money received shall be treated as received in exchange for each share of stock and security surrendered, based on the fair market value of the stock and securities surrendered.

(iii) For purposes of this section, if a shareholder or security holder surrenders a share of stock or a security in a transaction under the terms of section 354 (or so much of section 356 as relates to section 354) in which such shareholder or security holder receives no property or property (including property permitted by section 354 to be received without the recognition of gain or ''other property'' or money) with a fair market value less than that of the stock or securities surrendered in the transaction, such shareholder or security holder shall be treated as follows. First, the shareholder or security holder shall be treated as receiving the stock, securities, other property, and money actually received by the shareholder or security holder in the transaction and an amount of stock of the issuing corporation (as defined in §1.368–1(b)) that has a value equal to the excess of the value of the stock or securities the shareholder or security holder surrendered in the transaction over the value of the stock, securities, other property, and money the shareholder or security holder actually received in the transaction. If the shareholder owns only one class of stock of the issuing corporation the receipt of which would be consistent with the economic rights associated with each class of stock of the issuing corporation, the stock deemed received by the shareholder pursuant to the previous sentence shall be stock of such class. If the shareholder owns multiple classes of stock of the issuing corporation the receipt of which would be consistent with the economic rights associated with each class of stock of the issuing corporation, the stock deemed received by the shareholder shall be stock of each such class owned by the shareholder immediately prior to the transaction, in proportion to the value of the stock of each such class owned by the shareholder immediately prior to the transaction. The basis of each share of stock or security deemed received and actually received shall be determined under the rules of this section. Second, the shareholder or security holder shall then be treated as surrendering all of its shares of stock and securities in the issuing corporation, including those shares of stock or securities held immediately prior to the transaction, those shares of stock or securities actually received in the transaction, and those shares of stock deemed received pursuant to the previous sentence, in a reorganization under section 368(a)(1)(E) in exchange for the shares of stock and securities of the issuing corporation that the shareholder or security holder actually holds immediately after the transaction. The basis of each share of stock and security deemed received in the reorganization under section 368(a)(1)(E) shall be determined under the rules of this section.

(iv) If a shareholder or security holder receives one or more shares of stock or one or more securities in a distribution under the terms of section 355 (or so much of section 356 as relates to section 355), the basis of each share of stock or security of the distributing corporation (as defined in §1.355–1(b)), as adjusted under §1.358–1, shall be allocated between the share of stock or security of the distributing corporation with respect to which the distribution is made and the share or shares of stock or security or securities (or allocable portions

thereof) received with respect to the share of stock or security of the distributing corporation in proportion to their fair market values. If one share of stock or security is received with respect to more than one share of stock or security or if a fraction of a share of stock or security is received, then the basis of each share of stock or security of the distributing corporation must be allocated to the shares of stock or securities (or allocable portions thereof) received in a manner that reflects that, to the greatest extent possible, a share of stock or security received is received with respect to shares of stock or securities acquired on the same date and at the same price. To the extent it is not possible to allocate basis in this manner, the basis of each share of stock or security of the distributing corporation must be allocated to the shares of stock or securities (or allocable portions thereof) received in a manner that minimizes the disparity in the holding periods of the shares of stock or securities with respect to which such shares of stock or securities are received.

(v) If a shareholder or security holder receives shares of stock or securities of more than one class, or receives ''other property'' or money in addition to stock or securities in a distribution under the terms of section 355 (or so much of section 356 as relates to section 355), then, to the extent the terms of the distribution specify that shares of stock or securities of a particular class or ''other property'' or money is received with respect to a particular share of stock or security of the distributing corporation or a particular class of stock or securities of the distributing corporation, for purposes of applying the rules of this section, such terms shall control provided that such terms are economically reasonable. To the extent the terms of the distribution do not specify that shares of stock or securities of a particular class or ''other property'' or money is received with respect to a particular share of stock or security of the distributing corporation or a particular class of stock or securities of the distributing corporation, then, for purposes of applying the rules of this section, a pro rata portion of the shares of stock and securities of each class received and a pro rata portion of the ''other property'' and money received shall be treated as received with respect to each share of stock and security of the distributing corporation with respect to which the distribution is made, based on the fair market value of each such share of stock or security.

(vi) If a share of stock or a security is received in exchange for, or with respect to, more than one share of stock or security and such shares or securities were acquired on different dates or at different prices, the share of stock or security received shall be divided into segments based on the relative fair market values of the shares of stock or securities surrendered in exchange for such share or security or the relative fair market values of the shares of stock or securities with respect to which the share of stock or security is received in a distribution under the terms of section 355 (or so much of section 356 as relates to section 355)). Each segment shall have a basis determined under the rules of paragraph (a)(2) of this section and a corresponding holding period.

(vii) If a shareholder or security holder that purchased or acquired shares of stock or securities in a corporation on different dates or at different prices exchanges such shares of stock or securities under the terms of section 354, 355, or 356, or receives a distribution of shares of stock or securities under the terms of section 355 (or so much of section 356 as relates to section 355), and the shareholder or security holder is not able to identify which particular share of stock or security (or allocable portion of a share of stock or security) is received (or deemed received) in exchange for, or with respect to, a particular share of stock or security, the shareholder or security holder may designate which share of stock or security is received in exchange for, or with respect to, a particular share of stock or security, provided that such designation is consistent with the terms of the exchange or distribution (or an exchange deemed to have occurred pursuant to paragraph (a)(2)(iii) of this section), and the other rules of this section. In the case of an exchange under the terms of section 354 or 356 (including a deemed exchange as a result of the application of paragraph (a)(2)(iii) of this section), the designation must be made on or before the first date on which the basis of a share of stock or a security received (or deemed received in the reorganization under section 368(a)(1)(E) in the case of a transaction to which paragraph (a)(2)(iii) of this section applies) is relevant. In the case of an exchange or distribution under the terms of section 355 (or so much of section 356 as relates to section 355), the designation must be made on or before the first date on which the basis of a share of stock or a security of the distributing corporation or the controlled corporation (as defined in § 1.355–1(b)) is relevant. The basis of the shares or securities received in an exchange under the terms of section 354 or section 356, for example, is relevant when such shares or securities are sold or otherwise transferred. The designation will be binding for purposes of determining the Federal tax consequences of any sale or transfer of, or distribution with respect to, the shares or securities received. If the shareholder fails to make a designation in a case in which the shareholder is not able to identify which share of stock is received in exchange for, or with respect to, a particular share of stock, then the shareholder will not be able to identify which shares are sold or transferred for purposes of determining the basis of property sold or transferred under section 1012 and §1.1012–1(c) and, instead, will be treated as selling or transferring the share received in respect of the earliest share purchased or acquired.

(viii) This paragraph (a)(2) shall not apply to determine the basis of a share of stock or security received by a shareholder or security holder in an exchange described in both section 351 and section 354 or section 356, if, in connection with the exchange, the shareholder or security holder exchanges property for stock or securities in an exchange to which neither section 354 nor 356 applies or liabilities of the shareholder or security holder are assumed.

(ix) This paragraph (a)(2) shall apply to determine the basis of a share of stock or security received by a shareholder or security holder in an exchange described in both section 1036 and section 354 or section 356.

(b) *Allocation of basis in exchanges to which section 351 or 361 applies.* (1) As used in this paragraph (b), the term *stock* refers only to stock which is not ''other property'' under section 351 or 361 and the term *securities* refers only to securities which are not ''other property'' under section 351 or 361.

* * * * *

(c) *Examples.* The application of paragraphs (a) and (b) of this section is illustrated by the following examples:

Example 1. (i) *Facts.* J, an individual, acquired 20 shares of Corporation X stock on Date 1 for $3 each and 10 shares of Corporation X stock on Date 2 for $6 each. On Date 3, Corporation Y acquires the assets of Corporation X in a reorganization under section 368(a)(1)(A). Pursuant to the terms of the plan of reorganization, J receives 2 shares of Corporation Y stock in exchange for each share of Corporation X stock. Therefore, J receives 60 shares of Corporation Y stock. Pursuant to section 354, J recognizes no gain or loss on the exchange. J is not able to

identify which shares of Corporation Y stock are received in exchange for each share of Corporation X stock.

(ii) *Analysis.* Under paragraph (a)(2)(i) of this section, J has 40 shares of Corporation Y stock each of which has a basis of $1.50 and is treated as having been acquired on Date 1 and 20 shares of Corporation Y stock each of which has a basis of $3 and is treated as having been acquired on Date 2. Under paragraph (a)(2)(vii) of this section, on or before the date on which the basis of a share of Corporation Y stock received becomes relevant, J may designate which of the shares of Corporation Y stock have a basis of $1.50 and which have a basis of $3.

Example 2. (i) *Facts.* The facts are the same as in *Example 1*, except that instead of receiving 2 shares of Corporation Y stock in exchange for each share of Corporation X stock, J receives 1½ shares of Corporation Y stock in exchange for each share of Corporation X stock. Therefore, J receives 45 shares of Corporation Y stock. Again, J is not able to identify which shares (or portions of shares) of Corporation Y stock are received in exchange for each share of Corporation X stock.

(ii) *Analysis.* Under paragraph (a)(2)(i) of this section, J has 30 shares of Corporation Y stock each of which has a basis of $2 and is treated as having been acquired on Date 1 and 15 shares of Corporation Y stock each of which has a basis of $4 and is treated as having been acquired on Date 2. Under paragraph (a)(2)(vii) of this section, on or before the date on which the basis of a share of Corporation Y stock received becomes relevant, J may designate which of the shares of Corporation Y stock received have a basis of $2 and which have a basis of $4.

Example 3. (i) *Facts.* J, an individual, acquired 10 shares of Class A stock of Corporation X on Date 1 for $3 each, 10 shares of Class A stock of Corporation X on Date 2 for $9 each, and 10 shares of Class B stock of Corporation X on Date 3 for $3 each. On Date 4, J surrenders all of J's shares of Class A stock in exchange for 20 shares of new Class C stock and 20 shares of new Class D stock in a reorganization under section 368(a)(1)(E). Pursuant to section 354, J recognizes no gain or loss on the exchange. On the date of the exchange, the fair market value of each share of Class A stock is $6, the fair market value of each share of Class C stock is $2, and the fair market value of each share of Class D stock is $4. The terms of the exchange do not specify that shares of Class C stock or shares of Class D stock of Corporation X are received in exchange for particular shares of Class A stock of Corporation X.

(ii) *Analysis.* Under paragraph (a)(2)(ii) of this section, because the terms of the exchange do not specify that shares of Class C stock or shares of Class D stock of Corporation X are received in exchange for particular shares of Class A stock of Corporation X, a pro rata portion of the shares of Class C stock and shares of Class D stock received will be treated as received in exchange for each share of Class A stock based on the fair market value of the surrendered shares of Class A stock. Therefore, J is treated as receiving one share of Class C stock and one share of Class D stock in exchange for each share of Class A stock. Under paragraph (a)(2)(i) of this section, J has 10 shares of Class C stock, each of which has a basis of $1 and is treated as having been acquired on Date 1 and 10 shares of Class C stock, each of which has a basis of $3 and is treated as having been acquired on Date 2. In addition, J has 10 shares of Class D stock, each of which has a basis of $2 and is treated as having been acquired on Date 1 and 10 shares of Class D stock, each of which has a basis of $6 and is treated as having been acquired on Date 2. J's basis in each share of Class B stock remains $3. Under paragraph (a)(2)(vii) of this section, on or before the date on which the basis of a share of Class C stock or Class D stock received becomes relevant, J may designate which of the shares of Class C stock have a basis of $1 and which have a basis of $3, and which of the shares of Class D stock have a basis of $2 and which have a basis of $6.

Example 4. (i) *Facts.* J, an individual, acquired 10 shares of Class A stock of Corporation X on Date 1 for $2 each, 10 shares of Class A stock of Corporation X on Date 2 for $4 each, and 20 shares of Class B stock of Corporation X on Date 3 for $6 each. On Date 4, Corporation Y acquires the assets of Corporation X in a reorganization under section 368(a)(1)(A). Pursuant to the terms of the plan of reorganization, J surrenders all of J's shares of Corporation X stock for 40 shares of Corporation Y stock and $200 of cash. On the date of the exchange, the fair market value of each share of Class A stock of Corporation X is $10, the fair market value of each share of Class B stock of Corporation X is $10, and the fair market value of each share of Corporation Y stock is $5. The terms of the exchange do not specify that shares of Corporation Y stock or cash are received in exchange for particular shares of Class A stock or Class B stock of Corporation X.

(ii) *Analysis.* Under paragraph (a)(2)(ii) of this section and under section 1.356–1(b), because the terms of the exchange do not specify that shares of Corporation Y stock or cash are received in exchange for particular shares of Class A stock or Class B stock of Corporation X, a pro rata portion of the shares of Corporation Y stock and cash received will be treated as received in exchange for each share of Class A stock and Class B stock of Corporation X surrendered based on the fair market value of such stock. Therefore, J is treated as receiving one share of Corporation Y stock and $5 of cash in exchange for each share of Class A stock of Corporation X and one share of Corporation Y stock and $5 of cash in exchange for each share of Class B stock of Corporation X. J realizes a gain of $140 on the exchange of shares of Class A stock of Corporation X, $100 of which is recognized under section 1.356–1(a). J realizes a gain of $80 on the exchange of Class B stock of Corporation X, all of which is recognized under section 1.356–1(a). Under paragraph (a)(2)(i) of this section, J has 10 shares of Corporation Y stock, each of which has a basis of $2 and is treated as having been acquired on Date 1, 10 shares of Corporation Y stock, each of which has a basis of $4 and is treated as having been acquired on Date 2, and 20 shares of Corporation Y stock, each of which has a basis of $5 and is treated as having been acquired on Date 3. Under paragraph (a)(2)(viii) of this section, on or before the date on which the basis of a share of Corporation Y stock received becomes relevant, J may designate which of the shares of Corporation Y stock received have a basis of $2, which have a basis of $4, and which have a basis of $5.

Example 5. (i) *Facts.* The facts are the same as in *Example 4*, except that the terms of the plan of reorganization specify that J receives 40 shares of stock of Corporation Y in exchange for J's shares of Class A stock of Corporation X and $200 of cash in exchange for J's shares of Class B stock of Corporation X.

(ii) *Analysis.* Under paragraph (a)(2)(ii) of this section and under section 1.356–1(b), because the terms of the exchange specify that J receives 40 shares of stock of Corporation Y in exchange for J's shares of Class A stock of Corporation X and $200 of cash in exchange for J's shares of Class B stock of Corporation X and such terms are economically reasonable, such terms control. J realizes a gain of $140 on the exchange of shares of Class A stock of Corporation X, none of which is recognized under section 1.356–1(a). J realizes a gain of $80 on the exchange of shares of Class B stock of Corporation X, all of which is recognized under section 1.356–1(a). Under paragraph (a)(2)(i) of this section, J has 20 shares of Corporation Y stock, each of which has a basis of $1 and is treated as having been acquired on Date 1, and 20 shares of Corporation Y stock, each of which has a basis of $2 and is treated as having been acquired on Date 2. Under paragraph (a)(2)(vii) of this section, on or before the date on which the basis of a share of Corporation Y stock received becomes relevant, J may designate which of the shares of Corporation Y stock received have a basis of $1 and which have a basis of $2.

Example 6. (i) *Facts.* J, an individual, acquired 10 shares of stock of Corporation X on Date 1 for $2 each, and a security issued by Corporation X to J on Date 2 with a principal amount of $100 and a basis of $100. On Date 3, Corporation Y acquires the assets of Corporation X in a reorganization under section 368(a)(1)(A). Pursuant to the terms of the plan of reorganization, J surrenders all of J's shares of Corporation X stock in exchange for 10 shares of Corporation Y stock and surrenders J's Corporation X security in exchange for a Corporation Y security. On the date of the exchange, the fair market value of each share of stock of Corporation X is $10, the fair market value of J's Corporation X security is $100, the fair market value of each share of Corporation Y stock is $10, and the fair market value and principal amount of the Corporation Y security received by J is $100.

(ii) *Analysis.* Under paragraph (a)(2)(ii) of this section and under section 1.354–1(a), because the terms of the exchange specify that J receives 10 shares of stock of Corporation Y in exchange for J's shares of Class A stock of Corporation X and a Corporation Y security in exchange for its Corporation X security and such terms are economically reasonable, such terms control.

Pursuant to section 354, J recognizes no gain on either exchange. Under paragraph (a)(2)(i) of this section, J has 10 shares of Corporation Y stock, each of which has a basis of $2 and is treated as having been acquired on Date 1, and a security that has a basis of $100 and is treated as having been acquired on Date 2.

Example 7. (i) *Facts.* J, an individual, acquired 10 shares of Corporation X stock on Date 1 for $2 each and 10 shares of Corporation X stock on Date 2 for $5 each. On Date 3, Corporation Y acquires the stock of Corporation X in a reorganization under section 368(a)(1)(B). Pursuant to the terms of the plan of reorganization, J receives one share of Corporation Y stock in exchange for every 2 shares of Corporation X stock. Pursuant to section 354, J recognizes no gain or loss on the exchange. J is not able to identify which portion of each share of Corporation Y stock is received in exchange for each share of Corporation X stock.

(ii) *Analysis.* Under paragraph (a)(2)(i) of this section, J has 5 shares of Corporation Y stock each of which has a basis of $4 and is treated as having been acquired on Date 1 and 5 shares of Corporation Y stock each of which has a basis of $10 and is treated as having been acquired on Date 2. Under paragraph (a)(2)(vii) of this section, on or before the date on which the basis of a share of Corporation Y stock received becomes relevant, J may designate which of the shares of Corporation Y stock received have a basis of $4 and which have a basis of $10.

Example 8. (i) *Facts.* The facts are the same as in *Example 7*, except that, in addition to transferring the stock of Corporation X to Corporation Y, J transfers land to Corporation Y. In addition, after the transaction, J owns stock of Corporation Y satisfying the requirements of section 368(c). J's transfer of the Corporation X stock to Corporation Y is an exchange described in sections 351 and 354. J's transfer of land to Corporation Y is an exchange described in section 351.

(ii) *Analysis.* Under paragraph (a)(2)(viii) of this section, because neither section 354 nor section 356 applies to the transfer of land to Corporation Y, the rules of paragraph (a)(2) of this section do not apply to determine J's basis in the Corporation Y stock received in the transaction.

Example 9. (i) *Facts.* J, an individual, acquired 10 shares of Corporation X stock on Date 1 for $3 each and 10 shares of Corporation X stock on Date 2 for $6 each. On Date 3, Corporation Z, a newly formed, wholly owned subsidiary of Corporation Y, merges with and into Corporation X with Corporation X surviving. As part of the plan of merger, J receives one share of Corporation Y stock in exchange for each share of Corporation X stock. In connection with the transaction, Corporation Y assumes a liability of J. In addition, after the transaction, J owns stock of Corporation Y satisfying the requirements of section 368(c). J's transfer of the Corporation X stock to Corporation Y is an exchange described in sections 351 and 354.

(ii) *Analysis.* Under paragraph (a)(2)(viii) of this section, because, in connection with the transfer of the Corporation X stock to Corporation Y, Corporation Y assumed a liability of J, the rules of paragraph (a)(2) of this section do not apply to determine J's basis in the Corporation Y stock received in the transaction.

Example 10. (i) *Facts.* Each of Corporation X and Corporation Y has a single class of stock outstanding, all of which is owned by J, an individual. J acquired 100 shares of Corporation X stock on Date 1 for $1 each and 100 shares of Corporation Y stock on Date 2 for $2 each. On Date 3, Corporation Y acquires the assets of Corporation X in a reorganization under section 368(a)(1)(D). Pursuant to the terms of the plan of reorganization, J surrenders J's 100 shares of Corporation X stock but does not receive any additional Corporation Y stock. Immediately before the effective time of the reorganization, the fair market value of each share of Corporation X stock and each share of Corporation Y stock is $1. Pursuant to section 354, J recognizes no gain or loss.

(ii) *Analysis.* Under paragraph (a)(2)(iii) of this section, J is deemed to have received shares of Corporation Y stock with an aggregate fair market value of $100 in exchange for J's Corporation X shares. Given the number of outstanding shares of stock of Corporation Y and their value immediately before the effective time of the reorganization, J is deemed to have received 100 shares of stock of Corporation Y in the reorganization. Under paragraph (a)(2)(i) of this section, each of those shares has a basis of $1 and is treated as having been acquired on Date 1. Then, the stock of Corporation Y is deemed to be recapitalized in a reorganization under section 368(a)(1)(E) in which J receives 100 shares of Corporation Y stock in exchange for those shares of Corporation Y stock that J held immediately prior to the reorganization and those shares J is deemed to have received in the reorganization. Under paragraph (a)(2)(i), immediately after the reorganization, J holds 50 shares of Corporation Y stock each of which has a basis of $2 and is treated as having been acquired on Date 1 and 50 shares of Corporation Y stock each of which has a basis of $4 and is treated as having been acquired on Date 2. Under paragraph (a)(2)(vii) of this section, on or before the date on which the basis of any share of J's Corporation Y stock becomes relevant, J may designate which of the shares of Corporation Y have a basis of $2 and which have a basis of $4.

Example 11. (i) *Facts.* Corporation X has a single class of stock outstanding, all of which is owned by J, an individual. J acquired 100 shares of Corporation X stock on Date 1 for $1 each. Corporation Y has two classes of stock outstanding, common stock and nonvoting preferred stock. On Date 2, J acquired 100 shares of Corporation Y common stock for $2 each and 100 shares of Corporation Y preferred stock for $4 each. On Date 3, Corporation Y acquires the assets of Corporation X in a reorganization under section 368(a)(1)(D). Pursuant to the terms of the plan of reorganization, J surrenders J's 100 shares of Corporation X stock but does not receive any additional Corporation Y stock. Immediately before the effective time of the reorganization, the fair market value of each share of Corporation X stock is $10, the fair market value of each share of Corporation Y common stock is $10, and the fair market value of each share of Corporation Y preferred stock is $20. Pursuant to section 354, J recognizes no gain or loss.

(ii) *Analysis.* Under paragraph (a)(2)(iii) of this section, J is deemed to have received shares of Corporation Y stock with an aggregate fair market value of $1,000 in exchange for J's Corporation X shares. Consistent with the economics of the transaction and the rights associated with each class of stock of Corporation Y owned by J, J is deemed to receive additional shares of Corporation Y common stock. Because the value of the common stock indicates that liquidation preference associated with the Corporation Y preferred stock could be satisfied even if the reorganization did not occur, it is not appropriate to deem the issuance of additional Corporation Y preferred stock. Given the number of outstanding shares of common stock of Corporation Y and their value immediately before the effective time of the reorganization, J is deemed to have received 100 shares of common stock of Corporation Y in the reorganization. Under paragraph (a)(2)(i) of this section, each of those shares has a basis of $1 and is treated as having been acquired on Date 1. Then, the common stock of Corporation Y is deemed to be recapitalized in a reorganization under section 368(a)(1)(E) in which J receives 100 shares of Corporation Y common stock in exchange for those shares of Corporation Y common stock that J held immediately prior to the reorganization and those shares of Corporation Y common stock that J is deemed to have received in the reorganization. Under paragraph (a)(2)(i), immediately after the reorganization, J holds 50 shares of Corporation Y common stock each of which has a basis of $2 and is treated as having been acquired on Date 1 and 50 shares of Corporation Y common stock each of which has a basis of $4 and is treated as having been acquired on Date 2. Under paragraph (a)(2)(vii) of this section, on or before the date on which the basis of any share of J's Corporation Y common stock becomes relevant, J may designate which of those shares have a basis of $2 and which have a basis of $4.

Example 12. (i) *Facts.* J, an individual, acquired 5 shares of Corporation X stock on Date 1 for $4 each and 5 shares of Corporation X stock on Date 2 for $8 each. Corporation X owns all of the outstanding stock of Corporation Y. The fair market value of the stock of Corporation X is $1800. The fair market value of the stock of Corporation Y is $900. In a distribution to which section 355 applies, Corporation X distributes all of the stock of Corporation Y pro rata to its shareholders. No stock of Corporation X is surrendered in connection with the distribution. In the distribution, J receives 2 shares of Corporation Y stock with respect to each share of Corporation X stock. Pursuant to section 355, J recognizes no gain or loss on the receipt of the shares of Corporation Y stock. J is not able to identify which share of Corporation Y stock is received in respect of each share of Corporation X stock.

(ii) *Analysis.* Under paragraph (a)(2)(iv) of this section, because J receives 2 shares of

Corporation Y stock with respect to each share of Corporation X stock, the basis of each share of Corporation X stock is allocated between such share of Corporation X stock and two shares of Corporation Y stock in proportion to the fair market value of those shares. Therefore, each of the 5 shares of Corporation X stock acquired on Date 1 will have a basis of $2 and each of the 10 shares of Corporation Y stock received with respect to those shares will have a basis of $1. In addition, each of the 5 shares of Corporation X stock acquired on Date 2 will have a basis of $4 and each of the 10 shares of Corporation Y stock received with respect to those shares will have a basis of $2. Under paragraph (a)(2)(vii) of this section, on or before the date on which the basis of a share of Corporation Y stock received becomes relevant, J may designate which of the shares of Corporation Y stock have a basis of $1 and which have a basis of $2.

Example 13. (i) *Facts.* J, an individual, acquired 20 shares of Corporation X stock on Date 1 for $2 each and 20 shares of Corporation X stock on Date 2 for $4 each. Corporation X has 80 shares of stock outstanding. Corporation X owns 40 shares of stock of Corporation Y, which represents all of the outstanding stock of Corporation Y. The fair market value of the stock of Corporation X is $80. The fair market value of the stock of Corporation Y is $40. Corporation X distributes all of the stock of Corporation Y in a transaction to which section 355 applies. In the transaction, J surrenders 20 shares of stock of Corporation X in exchange for 20 shares of stock of Corporation Y. J retains 20 shares of Corporation X stock. Pursuant to section 355, J recognizes no gain or loss on the receipt of the shares of Corporation Y stock. J is not able to identify which shares of Corporation X stock are surrendered. In addition, J is not able to identify which shares of Corporation Y stock are received in exchange for each surrendered share of Corporation X stock.

(ii) *Analysis.* Under paragraph (a)(2)(i) of this section, J has 20 shares of Corporation Y stock each of which is treated as received in exchange for one share of Corporation X stock. The basis of the 20 shares of Corporation X stock that are retained by J will remain unchanged. Under paragraph (a)(2)(vii) of this section, on or before the date on which the basis of a share of Corporation X or Corporation Y stock becomes relevant, J may designate which shares of Corporation X stock J surrendered in the exchange and which share of the Corporation Y stock received is received for each share of Corporation X stock surrendered. Therefore, it is possible that a share of Corporation Y stock would have a basis of $2 and be treated as having been acquired on Date 1, or would have a basis of $4 and be treated as having been acquired on Date 2.

Example 14. (i) *Facts.* J, an individual, acquired 10 shares of Corporation X stock on Date 1 for $3 each, 10 shares of Corporation X stock on Date 2 for $18 each, 10 shares of Corporation X stock on Date 3 for $6 each, and 10 shares of Corporation X stock on Date 4 for $9 each. On Date 5, Corporation Y acquires the assets of Corporation X in a reorganization under section 368(a)(1)(A). Pursuant to the terms of the plan of reorganization, J receives a ¾ share of Corporation Y stock in exchange for each share of Corporation X stock. Therefore, J receives 30 shares of Corporation X stock. Pursuant to section 354, J recognizes no gain or loss on the exchange. J is not able to identify which shares of Corporation Y stock are received in exchange for each share (or portions of shares) of Corporation X stock.

(ii) *Analysis.* Under paragraph (a)(2)(i) of this section, J has 7 shares of Corporation Y stock each of which has a basis of $4 and is treated as having been acquired on Date 1, 7 shares of Corporation Y stock each of which has a basis of $24 and is treated as having been acquired on Date 2, 7 shares of Corporation Y stock each of which has a basis of $8 and is treated as having been acquired on Date 3, and 7 shares of Corporation Y stock each of which has a basis of $12 and is treated as having been acquired on Date 4. In addition, J has two shares of Corporation Y stock, each of which is divided into two equal segments under paragraph (a)(2)(vi) of this section. The first of those two shares has one segment with a basis of $2 that is treated as having been acquired on Date 1 and a second segment with a basis of $12 that is treated as having been acquired on Date 2. The second of those two shares has one segment with a basis of $4 that is treated as having been acquired on Date 3 and a second segment with a basis of $6 that is treated as having been acquired on Date 4. Under paragraph (a)(2)(vii), on or before the date on which a share of Corporation Y stock received becomes relevant, J may designate which of the shares of Corporation Y stock have a basis of $4, which have a basis of $24, which have a basis of $8, which have a basis of $12, and which share has a split basis of $2 and $12, and which share has a split basis of $4 and $6.

(d) *Effective date.* This section applies to exchanges and distributions of stock and securities occurring on or after January 23, 2006.

■ **Par. 5.** Section 1.1502–19 is amended as follows:

■ 1. Revising paragraph (d).

■ 2. Revising paragraph (g) *Example 2.*

■ 3. Revising the paragraph heading for paragraph (h).

■ 4. Adding paragraph (h)(2)(iv).

■ 5. Adding a sentence at the end of paragraph (h)(3).

The revisions and additions read as follows:

§ 1.1502–19 Excess loss accounts.

* * * * *

(d) [Reserved]. For further guidance, see § 1.1502–19T(d).

* * * * *

(g) * * *

Example 2. [*Reserved*]. For further guidance, see § 1.1502–19T(g) *Example 2.*

* * * * *

(h) *Effective dates.* * * *

(2) * * *

(iv) [Reserved]. For further guidance, see §1.1502–19T(h)(2)(iv).

(3) * * * For guidance regarding determinations of the basis of the stock of a subsidiary acquired in an intercompany reorganization before January 23, 2006, see paragraph (d) and (g) *Example 2* of §1.1502–19 as contained in the 26 CFR part 1 edition revised as of April 1, 2005.

■ **Par. 6.** Section 1.1502–19T is revised to read as follows:

§ 1.1502–19T Excess Loss Accounts (temporary).

* * * * *

(b)(2) through (c) [Reserved]. For further guidance, see § 1.1502–19(b)(2) through (c).

(d) *Special allocation of basis in connection with an adjustment or determination*—(1) *Excess loss account in original shares.* If a member has an excess loss account in shares of a class of S's stock at the time of a basis adjustment or determination under the Internal Revenue Code with respect to shares of the same class of S's stock owned by the member, the adjustment or determination is allocated first to equalize and eliminate that member's excess loss account. See §1.1502–32(c) for similar allocations of investment adjustments to prevent or eliminate excess loss accounts.

(2) *Excess loss account in new S shares.* If a member would otherwise determine shares of a class of S's stock (new shares) to have an excess loss account and such member owns one or more other shares of the same class of S's stock, the basis of such other shares is allocated to eliminate and equalize any excess loss account that would otherwise be in the new shares.

(e) through (g) *Example 1* [Reserved]. For further guidance, see § 1.1502–19(e) through (g) *Example 1.*

Example 2. Basis determinations under the Internal Revenue Code in intercompany reorganizations-transfer of shares without an excess loss account. (i) *Facts.* P owns all of the stock of S and T. P has 150 shares of S stock that it acquired on Date 1. Each S share has a $1 basis and a fair market value of $1. P has 100 shares of T stock that it acquired on Date 2. Each T share has a $1.20 excess loss account and a fair market value of $1. P transfers S's stock to T without receiving additional T stock. The transfer is an exchange described in both sections 351 and 354.

(ii) *Analysis.* Under sections 351 and 354, P does not recognize gain in connection with the transfer. Under §1.358–2(a)(2)(iii), P is deemed to receive 150 shares of T stock. Without regard to the application of paragraph (d) of this section, under section 358 and §1.358–2(a)(2)(i), P would have a $1 basis in each such share. However, because the basis of the additional shares of T stock would be determined when P has an excess loss account in its original shares of T stock,

under paragraph (d)(1) of this section, the basis that P would otherwise have in such additional shares would eliminate the excess loss account in P's original shares of T stock such that each original share of T stock would have a basis of $0 and each share of T stock deemed received would have a basis of $0.20. Then, under §1.358–2(a)(2)(iii), the T stock is deemed to be recapitalized in a reorganization under section 368(a)(1)(E) in which P receives 100 shares of T stock (those shares P actually owns immediately after the transfer) in exchange for those 100 shares of T stock that P held immediately prior to the transfer and those 150 shares of T stock P is deemed to receive in the transfer. Under § 1.358–2(a)(2)(i), immediately after the transfer, P holds 100 shares of T stock, 60 of which each have a basis of $0.50 and 40 of which each have a basis of $0. In addition, T takes a $1 basis in each share of S stock under section 362. (If P had actually received an additional 150 shares of T stock, paragraph (d)(1) of this section would apply to shift basis from such additional T shares to P's original T shares because the basis of the additional T stock would be determined when P has an excess loss account in its original T shares. P would have a basis of $0 in each of the original T shares and a $0.20 basis in each of the additional T shares.)

(iii) *Transfer of shares with an excess loss account.* The facts are the same as in paragraph (i) of this *Example 2*, except that P transfers T's stock to S without receiving additional S stock. The transfer is an exchange described in both sections 351 and 354. Under paragraph (c) of this section, P's transfer is treated as a disposition of T's stock. Under sections 351 and 354 and paragraph (b)(2) of this section, P does not recognize gain from the disposition. Under section 358 and § 1.358–2(a)(2)(iii), P is deemed to have received 100 shares of S stock. Without regard to the application of paragraph (d) of this section, P would have a $1.20 excess loss account in each such share. However, because P would have an excess loss account in such shares and P owns other shares of S stock of the same class, under paragraph (d)(2) of this section, the excess loss account that P would otherwise have in such shares would decrease P's basis in its original shares of S's stock such that each such original share would have a basis of $0.20 and each share deemed received would have a basis of $0. Then, under §1.358–2(a)(2)(iii), the S stock is deemed to be recapitalized in a reorganization under section 368(a)(1)(E) in which P receives 150 shares of S stock (those shares P actually owns immediately after the transfer) in exchange for those 150 shares of S stock that P held immediately prior to the transfer and those 100 shares of S stock that P is deemed to receive in connection with the transfer. Under §1.358–2(a)(2)(i), immediately after the transfer, P holds 150 shares of S stock, 90 of which each have a basis of $0.33 and 60 of which each have a basis of $0. In addition, S takes an excess loss account of $1.20 in each share of T stock under section 362. (If P had actually received 100 additional shares of S stock, paragraph (d)(2) of this section would apply to shift basis from P's original S stock because P would have otherwise had an excess loss account in such additional shares and P owns other shares of S stock of the same class. The excess loss account that P would have otherwise had in such additional shares would have decreased P's basis in its original shares of S's stock. P would have had a basis of $0.20 in each of the original shares and a basis of $0 in each of the additional shares.)

(iv) *Intercompany merger-shares with excess loss account retained.* The facts are the same as in paragraph (i) of this *Example 2*, except that S merges into T in a reorganization described in section 368(a)(1)(A) (and in section 368(a)(1)(D)), and P receives 150 additional shares of T stock in the reorganization. Under section 354 and paragraph (b)(2) of this section, P does not recognize gain. Without regard to the application of paragraph (d) of this section, under section 358 and §1.358–2(a)(2)(i), P would have a $1 basis in each such share. However, because the basis of the additional shares of T stock would be determined when P has an excess loss account in its original shares of T stock, under paragraph (d)(1) of this section, the basis that P would otherwise have in such additional shares eliminates the excess loss account in P's original shares of T stock such that each original share of T stock has a basis of $0 and each additional share of T stock has a basis of $0.20.

(v) *Intercompany merger-shares with excess loss account surrendered.* The facts are the same as in paragraph (i) of this *Example 2*, except that T merges into S in a reorganization described in section 368(a)(1)(A) (and in section 368(a)(1)(D)), and P receives 100 additional shares of S stock in the reorganization. Under section 354 and paragraph (b)(2) of this section, P does not recognize gain from the disposition. Without regard to the application of paragraph (d) of this section, under section 358 and §1.358–2(a)(2)(i), P would have a $1.20 excess loss account in each additional share of S stock received. However, because P would have an excess loss account in such shares and P owns other shares of S stock of the same class, under paragraph (d)(2) of this section, the excess loss account that P would otherwise have in such shares decreases P's basis in its original shares of S's stock such that each original share of S stock has a basis of $0.20 and each additional share of S stock has a basis of $0.

(g) *Example 3* through (h)(2)(iii) [Reserved]. For further guidance, see §1.1502–19(g) *Example 3* through (h)(2)(iii).

(h)(2)(iv) *Intercompany reorganizations.* For guidance regarding determinations of the basis of the stock of a subsidiary acquired in an intercompany reorganization on or after January 23, 2006 (see paragraphs (d) and (g) *Example 2* of this section).

(3) [Reserved] For further guidance, see §1.1502–19(h)(3).

■ **Par. 7.** Section 1.1502–32 is amended by:

■ 1. Revising *Example 6* of paragraph (b)(5)(ii).

■ 2. Revising the first sentence of paragraph (h)(1).

■ 3. Adding new paragraph (h)(8).

The revisions and addition read as follows:

§ 1.1502–32 Investment Adjustments.

* * * * *

(b) * * *

(5) * * *

(ii) * * *

Example 6. Reorganization with boot. (i) *Facts.* P owns all the stock of S and T. P owns ten shares of the same class of common stock of S and ten shares of the same class of common stock of T. The fair market value of each share of S stock is $10 and the fair market value of each share of T stock is $10. On January 1 of Year 1, P has a $5 basis in each of its ten shares of S stock and a $10 basis in each of its ten shares of T stock. S and T have no items of income, gain, deduction, or loss for Year 1. S and T each have substantial earnings and profits. At the close of Year 1, T merges into S in a reorganization described in section 368(a)(1)(A) (and in section 368(a)(1)(D)). P receives no additional S stock, but does receive $10 which is treated as a dividend under section 356(a)(2).

(ii) *Analysis.* The merger of T into S is a transaction to which §1.1502–13(f)(3) applies. Under §1.1502–13(f)(3) and §1.358–2(a)(2)(iii), P is deemed to receive ten additional shares of S stock with a total fair market value of $100 (the fair market value of the T stock surrendered by P). Under §1.358–2(a)(2)(i), P will have a basis of $10 in each share of S stock deemed received in the reorganization. Under §1.358–2(a)(2)(iii), P is deemed to surrender all twenty shares of its S stock in a recapitalization under section 368(a)(1)(E) in exchange for the ten shares of S stock, the number of shares of S stock held by P immediately after the transaction. Thus, under §1.358–2(a)(2)(i), P has five shares of S stock each with a basis of $10 and five shares of S stock each with a basis of $20. The $10 P received is treated as a dividend distribution under section 301 and, under paragraph (b)(3)(v) of this section, the $10 is a distribution to which paragraph (b)(2)(iv) of this section applies. Accordingly, P's total basis in the S stock is decreased by the $10 distribution.

* * * * *

(h) *Effective date*—(1) *General rule.* Except as provided in paragraph (h)(8) of this section, this section applies with respect to determinations of the basis of the stock of a subsidiary (*e.g.*, for determining gain or loss from a disposition of stock), in consolidated return years beginning on or after January 1, 1995. * * *

(8) *Determination of stock basis in reorganization with boot.* Paragraph (b)(5)(ii) *Example 6* of this section applies only with respect to determinations of the basis of the stock of a subsidiary after January 26, 2006. For determinations of the basis of the

stock of a subsidiary on or before January 26, 2006, see §1.1502–32(b)(5)(ii) *Example 6* as contained in the 26 CFR part 1 edition revised as of April 1, 2005.

Mark E. Matthews,

Deputy Commissioner for Services and Enforcement.

Approved: January 17, 2006.

Eric Solomon,

Acting Deputy Assistant Secretary of the Treasury (Tax Policy).

[FR Doc. 06–585 Filed 1–23–06; 11:43 am]

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DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9243]

RIN 1545–BA65

Revision of Income Tax Regulations Under Sections 367, 884, and 6038B Dealing With Statutory Mergers or Consolidations Under Section 368(a)(1)(A) Involving One or More Foreign Corporations, and Guidance Necessary To Facilitate Business Electronic Filing Under Section 6038B

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final and temporary regulations.

SUMMARY: This document contains final regulations amending the income tax regulations under various provisions of the Internal Revenue Code (Code) to account for statutory mergers and consolidations under section 368(a)(1)(A) (including such reorganizations described in section 368(a)(2)(D) or (E)) involving one or more foreign corporations. These final regulations are issued concurrently with final regulations (TD 9242) that define a reorganization under section 368(a)(1)(A) to include certain statutory mergers or consolidations effected pursuant to foreign law. This document also contains final regulations under section 6038B which facilitate the electronic filing of Form 926 ''Return by a U.S. Transferor of Property to a Foreign Corporation.''

DATES: *Effective Date:* These regulations are effective on January 23, 2006.

Applicability Dates: For dates of applicability, see § 1.367(a)–3(e); § 1.367(b)–6(a)(1); § 1.367(b)–13(f); § 1.884–2(g); and § 1.6038B–1(b)(1)(i) and (g).

FOR FURTHER INFORMATION CONTACT: Robert W. Lorence, Jr., (202) 622–3918 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collection of information contained in these final regulations has been reviewed and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act (44 U.S.C. 3507(d)) under control numbers 1545–1478 and 1545–1617.

The collection of information in these final regulations is in § 1.367(a)–3(d)(2)(vi)(B)(*1*)(*ii*) and § 1.6038B–1(b)(1)(i). The information under § 1.367(a)–3(d)(2)(vi)(B)(*1*)(*ii*) is required to inform the IRS of a domestic corporation (domestic acquired corporation) that is claiming an exception from the application of section 367(a) and (d) for certain transfers of property to a foreign corporation that is re-transferred by the foreign corporation to a domestic corporation controlled by the foreign corporation (domestic controlled corporation). The information is in the form of a statement attached to the domestic acquired corporation's U.S. income tax return for the year of the transfer certifying that if the foreign corporation disposes of the stock of the domestic controlled corporation with a tax avoidance purpose, the domestic acquired corporation will file an income tax return (or amended return, as the case may be) reporting gain. The collection of information is mandatory.

The information under § 1.6038B–1(b)(1)(i) is required to inform the IRS of transfers described in section 6038B(a)(1)(A) or section 367(d) or (e) by filing Form 926 ''Return by a U.S. Transferor of Property to a Foreign Corporation'' and any information attached to the form with the U.S. transferor's income tax return for the taxable year of the transfer. The collection of information is mandatory.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by the Office of Management and Budget.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Background

On January 24, 2003, the IRS and Treasury issued proposed regulations (REG–126485–01, 2003–1 C.B. 542, 68 FR 3477) and temporary regulations (TD 9038, 2003–1 C.B. 524, 68 FR 3384), that would revise the definition of a statutory merger or consolidation under section 368(a)(1)(A). On January 5, 2005, the IRS and Treasury issued proposed regulations (REG–117969–00, 2005–7 I.R.B. 533, 70 FR 746) that would revise the definition of a section 368(a)(1)(A) reorganization to include transactions effected pursuant to foreign law and transactions involving entities organized under foreign law. Final regulations incorporating the temporary regulations and both sets of proposed regulations, as modified to reflect comments, are being published concurrently with this document.

On January 5, 2005, the IRS and Treasury also issued proposed regulations under sections 358, 367 and 884 (the 2005 proposed regulations) that would account for section 368(a)(1)(A) reorganizations involving one or more foreign corporations. The regulations also proposed changes to other aspects of the section 367(a) and (b) regulations that would address additional issues. This document contains final regulations that incorporate the 2005 proposed regulations amending sections 358, 367, and 884.

The public hearing with respect to the 2005 proposed regulations was cancelled because no request to speak was received. However, the IRS and Treasury received several written comments, which are discussed below.

On December 19, 2003, the IRS and Treasury issued temporary and final regulations (TD 9100, 2004–1 C.B. 297, 68 FR 70701) modifying regulations under section 6038B to eliminate regulatory impediments to the electronic submission of Form 926 ''Return by a U.S. Transferor of Property to a Foreign Corporation.'' In the same issue of the **Federal Register**, the IRS and Treasury issued a notice of proposed rulemaking (REG–116664–01, 2004–1 C.B. 319, 68 FR 70747) cross-referencing the temporary regulations under section 6038B. This document contains final regulations incorporating certain provisions of the temporary regulations under section 6038B. No public hearing regarding the notice of proposed rulemaking was requested or held and no comments were received.

Summary of Comments and Explanation of Provisions

A. Basis and Holding Period Rules

1. Section 354 Exchanges

On May 3, 2004, the IRS and Treasury published a notice of proposed rulemaking (REG–116564–03) in the **Federal Register** (69 FR 24107) that included regulations under section 358 that would provide guidance regarding the determination of the basis of stock or securities received in either a reorganization described in section 368 (*e.g.*, in a section 354 exchange) or a distribution to which section 355 applies. The proposed section 358 regulations would adopt a tracing regime for determining the basis of each share of stock or security received in an exchange under section 354 (or section 356). Related provisions in the 2005 proposed regulations followed that general tracing regime, with modifications. See Prop. Treas. Reg. § 1.367(b)–13(b). Comments were received in response to the proposed regulations under section 358. The IRS and Treasury have issued final regulations under section 358 that adopted the section 358 proposed regulations, with modifications to reflect the comments received. See TD 9244.

The final section 358 regulations retained the general tracing regime for determining basis in an exchange under section 354 (or section 356). This tracing regime is consistent with the policies and requirements underlying the international provisions of the Code, including those under section 1248. As a result, these final regulations do not include the rules set forth in § 1.367(b)–13(b) of the 2005 proposed regulations that would determine the basis and holding period in stock as a result of certain exchanges under section 354 (or section 356) involving foreign corporations. Instead, the final regulations cross-reference the regulations under section 358 to determine the exchanging shareholder's basis in stock or securities received in an exchange under section 354 (and section 356). Special rules for certain triangular reorganizations are discussed below.

2. Triangular Asset Reorganizations

In contrast to the above, the application of the stock basis rules of § 1.358–6 in certain triangular asset reorganizations involving foreign corporations does not accurately preserve a shareholder's section 1248 amount (within the meaning of § 1.367(b)–2(c)). Therefore, the 2005 proposed regulations would provide special basis and holding period rules for certain triangular asset reorganizations involving foreign corporations that have section 1248 shareholders (within the meaning of § 1.367(b)–2(b)). See Prop. Treas. Reg. § 1.367(b)–13(c) through (e). These rules would apply to certain reorganizations described in section 368(a)(1)(A) and (a)(2)(D) (forward triangular merger), triangular reorganizations described in section 368(a)(1)(C), and reorganizations described in section 368(a)(1)(A) and (a)(2)(E) (reverse triangular merger).

The 2005 proposed regulations would provide that, in determining the stock basis of the surviving corporation in certain triangular asset reorganizations, the exchanging shareholder's basis in the stock of the target corporation will be taken into account, rather than target corporation's basis in its assets. Further, where applicable, the 2005 proposed regulations would provide for a divided basis and holding period in each share of stock in the surviving corporation to reflect the relevant section 1248 amounts, if any, in the stock of the target corporation and the surviving corporation. If there are two or more blocks of stock in the target corporation with section 1248 amounts, then each share of the surviving corporation would be further divided to account for each block of stock. If two or more blocks of stock are held by one or more shareholders that are not section 1248 shareholders, then shares in these blocks would be aggregated into one divided portion for basis purposes. If none of the shareholders is a section 1248 shareholder, then the asset basis rules of § 1.358–6 would apply.

Commentators stated that the application of the special basis rules would cause unjustified complexity. One commentator stated that such complexity arises in cases where the shares of the target corporation are widely held or where section 1248 shareholders hold less than 50 percent of the target corporation. The commentator recommended that if the special basis rules are retained, § 1.358–6 should continue to apply where section 1248 shareholders hold less than 50 percent of the stock of the target corporation. The commentator further recommended that the controlling corporation be allowed to elect to apply the rules under § 1.358–6 in return for all exchanging section 1248 shareholders including in income the section 1248 amounts with respect to their stock. The IRS and Treasury have considered these comments. On balance, the IRS and Treasury have concluded that creating exceptions to the application of the special basis rules (*e.g.*, by election) would create significant uncertainty for the IRS and would not meaningfully reduce administrative complexity. While the IRS and Treasury recognize the complexity of the rules, the IRS and Treasury nevertheless believe it is important to preserve section 1248 amounts and avoid unnecessary income inclusions that might otherwise be required. As a result, the final regulations do not adopt this recommendation. However, the IRS and Treasury will continue to study alternative methods for preserving the section 1248 amounts in such transactions.

One commentator suggested that the IRS and Treasury consider applying the special basis rules to section 368(a) asset reorganizations followed by asset transfers to a corporation controlled (within the meaning of section 368(c)) by the acquiring corporation pursuant to the same transaction (controlled asset transfer), because these transactions are similar to triangular reorganizations under section 368(a)(1)(C) and section 368(a)(1)(A) and (a)(2)(D). If this suggestion were adopted, the basis in the stock of the controlled subsidiary would reflect the basis in the stock of the target corporation and not the basis of the contributed assets. Because the IRS and Treasury are continuing to study the application of section 358 to such transactions, and because such controlled asset transfers may involve only a portion of the acquired assets, this comment is not adopted at this time.

Finally, commentators noted that the special basis rules of § 1.367(b)–13(c) of the 2005 proposed regulations would not apply, by their terms, to a forward triangular merger or a triangular section 368(a)(1)(C) reorganization where no shareholder of the target corporation is a section 1248 shareholder, but the parent of the acquiring corporation is either a domestic corporation that is a section 1248 shareholder of the acquiring corporation or a foreign corporation that has a section 1248 shareholder that is also a section 1248 shareholder of the acquiring corporation. This result was not intended, as illustrated by *Example 3* of § 1.367(b)–13(e) of the 2005 proposed regulations, which applies the special basis rules of § 1.367(b)–13(c) of the 2005 proposed regulations to such a transaction. As a result, the text of the final regulations has been modified to apply the special basis rules to this type of transaction.

B. Exceptions to the Application of Section 367(a)

1. Exchanges of Stock or Securities in Certain Triangular Asset Reorganizations

A U.S. person recognizes gain under section 367(a) on the transfer of property to a foreign corporation in an exchange described in section 351, 354, 356, or 361, unless an exception applies. Under § 1.367(a)–3(a), section 367(a) does not apply if, pursuant to a section 354 exchange, a U.S. person transfers stock of a domestic or foreign corporation ''for stock of a foreign corporation'' in an asset reorganization described in section 368(a)(1) that is not treated as an indirect stock transfer.

Notwithstanding the language in the current regulations, this exception is intended to apply to any section 354 (or section 356) exchange made pursuant to an asset reorganization under section 368(a)(1) that is not treated as an indirect stock transfer under § 1.367(a)–3(d). However, commentators noted that in certain triangular asset reorganizations where a U.S. person transfers stock of a foreign acquired corporation to such foreign corporation in a section 354 (or section 356) exchange, but receives stock of the domestic parent of the foreign acquiring corporation pursuant to such exchange, the transfer by the U.S. person might be subject to section 367(a). This would be the case because, under § 1.367(a)–3(a), the U.S. person does not receive ''stock of a foreign corporation.'' This result was not intended. Accordingly, the final regulations clarify the application of this rule by removing the phrase ''for stock of a foreign corporation.'' Thus, section 367(a) will not apply to any section 354 (or section 356) exchange of stock or securities of a domestic or foreign corporation pursuant to an asset reorganization under section 368(a)(1), unless the exchange is considered an indirect stock transfer pursuant to § 1.367(a)–3(d). A conforming change also is made to the section 6038B reporting rules (see part J. of this preamble).

2. Exchanges of Securities in Certain Recapitalizations and Other Reorganizations

Prior to the issuance of the 2005 proposed regulations, several commentators noted that the exception to the application of section 367(a) contained in § 1.367(a)–3(a) applied to exchanges of stock, but not exchanges of securities, in section 368(a)(1)(E) reorganizations and certain asset reorganizations. In response, the IRS and Treasury issued Notice 2005–6 (2005–5 I.R.B. 448) concurrently with the 2005 proposed regulations, and announced the plan to amend § 1.367(a)–3(a) to apply the exception to exchanges of stock or securities. These final regulations incorporate the rule announced in Notice 2005–6, including the dates of applicability as discussed below in part K.3. of this preamble.

Consistent with these changes, these final regulations also amend the indirect stock transfer rules of § 1.367(a)–3(d) to provide that exchanges by a U.S. person of stock or securities of an acquired corporation for stock or securities of the corporation that controls the acquiring corporation in a triangular section 368(a)(1)(B) reorganization will be treated as an indirect transfer of such stock or securities subject to the rules of section 367(a). This amendment conforms the treatment of triangular section 368(a)(1)(B) reorganizations with the other indirect stock transfers described in § 1.367(a)–3(d). Although this amendment has a prospective effective date, no inference is intended as to the application of current law to such exchanges.

Other provisions of the section 367 regulations also contain references to exchanges of stock but not to securities. See, *e.g.*, § 1.367(a)–8(e)(1)(i). The IRS and Treasury are studying these references and intend to amend these provisions if these omissions are not appropriate.

C. Concurrent Application of Section 367(a) and (b)

The 2005 proposed regulations would modify the concurrent application of section 367(a) and (b) to exchanges that require the inclusion in income of the exchanging United States shareholder's all earnings and profits amount under section 367(b). The 2005 proposed regulations would provide that the rules of section 367(b), and not section 367(a), apply to such exchanges in cases where the all earnings and profits amount attributable to the stock of an exchanging shareholder is greater than the amount of gain in such stock subject to section 367(a) pursuant to the indirect stock transfer rules. In such a case, the shareholder would be required to include in income as a deemed dividend the all earnings and profits amount pursuant to § 1.367(b)–3, without regard to whether the exchanging shareholder files a gain recognition agreement as provided under §§ 1.367(a)–3(b) and 1.367(a)–8. This change was proposed because the IRS and Treasury determined that it was contrary to the policy of section 367(b) to allow a shareholder effectively to elect to be taxed on the lesser amount of gain under section 367(a) simply by failing to file a gain recognition agreement.

Two comments were received with respect to this overlap rule. One commentator questioned, as a general matter, the application of § 1.367(b)–3 and the all earnings and profits rule to inbound asset acquisitions and, more specifically, the broadening of the circumstances under the 2005 proposed regulations where a taxpayer would be required to include in income as a deemed dividend the all earnings and profits amount. The commentator suggested an alternative means to taxing the earnings and profits of the foreign acquired corporation, such as reducing the basis of assets brought into the United States to the extent of any previously untaxed earnings and profits. The IRS and Treasury, at this time, do not believe that a comprehensive revision of the all earnings and profits rule is necessary or appropriate. Alternative approaches to the all earnings and profits rule are beyond the scope of this regulation project, because, for example, any such revision would have to take into account recently enacted section 362(e). As a result, this comment is not adopted.

The second comment stated that the overlap rule adds unnecessary complexity to the section 367 regulations, because it is unlikely that a transaction will occur that would invoke the rule (*i.e.*, where a foreign acquired corporation transfers its assets to a domestic subsidiary of a foreign parent corporation in a triangular reorganization). The overlap rule in the 2005 proposed regulations was intended to address cases that are affected by this rule. The IRS and Treasury continue to believe that the rule is necessary to preserve the policies of section 367(b), and that the rule as applied in these contexts does not create undue complexity. For this reason, the comment is not adopted.

D. Triangular Section 368(a)(1)(B) Reorganizations

In a triangular section 368(a)(1)(B) reorganization, if a U.S. person exchanges stock of an acquired corporation for voting stock of a foreign corporation that controls (within the meaning of section 368(c)) the acquiring corporation, the U.S. person is treated as making an indirect transfer of stock of the acquired corporation to the foreign controlling corporation in a transfer subject to section 367(a). § 1.367(a)–3(d)(1)(iii). The current regulations do not, however, treat as an indirect stock transfer a triangular section 368(a)(1)(B) reorganization where the acquiring

corporation is foreign and the controlling corporation is domestic. The 2005 proposed regulations would extend the indirect stock transfer rules to include triangular section 368(a)(1)(B) reorganizations in which a U.S. person exchanges stock of the acquired corporation for voting stock of a domestic corporation that controls the foreign acquiring corporation. In such a case, the 2005 proposed regulations would provide that a gain recognition agreement filed pursuant to such transaction is triggered if the domestic controlling corporation disposes of the stock of the foreign acquiring corporation, or the foreign acquiring corporation disposes of the stock of the acquired corporation.

Commentators stated that because any built-in gain in the stock of the acquired corporation is reflected in the stock of the foreign acquiring corporation held by the domestic controlling corporation under § 1.358–6(c)(3), a gain recognition agreement should not be triggered if the domestic controlling corporation disposes of the stock of the foreign acquiring corporation. The IRS and Treasury agree, in part, with this comment. Accordingly, the final regulations provide that, in certain cases, the disposition of the stock of the foreign acquiring corporation is not a triggering event. For example, the gain recognition agreement terminates in such a case if the domestic controlling corporation disposes of the stock of the foreign acquiring corporation in a taxable exchange. See § 1.367(a)–8(h)(1).

E. Identifying the Stock Transferred in Indirect Stock Transfers Involving a Change in Domestic or Foreign Status of the Acquired Corporation

Under the current section 367(a) regulations, if a U.S. person exchanges stock or securities of an acquired corporation for stock or securities of a foreign acquiring corporation in, for example, a section 368(a)(1)(C) reorganization, and the foreign acquiring corporation transfers all or part of the assets of the acquired corporation to a corporation in a controlled asset transfer, the U.S. person is treated, for purposes of section 367(a), as transferring the stock or securities of the acquired corporation to the foreign acquiring corporation to the extent of the assets transferred to the controlled subsidiary. § 1.367(a)–3(d)(1)(v); see also § 1.367(a)–3(d)(3), *Example 5A.*

A commentator stated that the indirect stock transfer rules should apply to such a transaction based on the status of the controlled subsidiary, rather than the status of the acquired corporation. Under this approach, if the acquired corporation were domestic and the controlled subsidiary were foreign, U.S. persons that exchange stock or securities of the domestic acquired corporation would be treated as having made an indirect stock transfer of stock or securities of a foreign corporation to a foreign corporation subject to § 1.367(a)–3(b), rather than of stock or securities of a domestic corporation that would be subject to the more restrictive rules of § 1.367(a)–3(c).

The IRS and Treasury agree, in part, with this comment and believe that § 1.367(a)–3(c) should not apply to certain indirect stock transfers that occur by reason of transactions involving a subsidiary member of a consolidated group to the extent that the assets of the domestic acquired corporation are ultimately transferred to a foreign corporation. Accordingly, the final regulations provide that where a subsidiary member of a consolidated group transfers its assets to a foreign corporation pursuant to an asset reorganization, and an indirect stock transfer described in § 1.367(a)–3(d)(1)(i) (mergers described in section 368(a)(1)(A) and (a)(2)(D) and reorganizations described in section 368(a)(1)(G) and (a)(2)(D)), (iv) (triangular reorganizations described in section 368(a)(1)(C)), or (v) (asset reorganizations followed by a controlled asset transfer) occurs in connection with such transfer, the U.S. persons that exchange stock or securities in the domestic acquired corporation pursuant to section 354 (or section 356) will be treated for purposes of § 1.367(a)–3 as having made an indirect transfer of foreign stock or securities subject to the rules of § 1.367(a)–3(b) (and not domestic stock or securities subject to § 1.367(a)–3(c)). In the case where the foreign acquiring corporation transfers assets in a controlled asset transfer to a foreign corporation, the exception applies only to the extent of the assets transferred to the foreign corporation. Further, the exception does not apply to the extent that the assets of the domestic acquired corporation are ultimately transferred in one or more successive controlled asset transfers to a domestic corporation. Thus, in such a case, the indirect stock transfer remains subject to § 1.367(a)–3(c). The rules relating to foreign acquired corporations remain the same as under current law (that is, the indirect stock transfer rules are based on the status of the foreign acquired corporation).

The IRS and Treasury are studying in a separate project the interaction of section 7874 and § 1.367(a)–3(c). In connection with this study, the IRS and Treasury will continue to examine whether the recommended change should also apply to other transactions. The results of this study may be addressed in a future regulations project. At this time, however, the final regulation will continue to apply to other transactions based on the stock that is owned and exchanged by the U.S. person in the transaction (rather than based on stock of the corporation in which the assets of the acquired corporation are ultimately transferred). Comments are requested as to whether the exception, described above, should be expanded to other ownership structures (*e.g.*, where the domestic target corporation is an affiliated but not consolidated group member).

F. Coordination of the Indirect Stock Transfer Rules and the Asset Transfer Rules

Under the current regulations, when an indirect stock transfer also involves a transfer of assets by a domestic corporation to a foreign corporation, section 367(a) and (d) apply to the domestic corporation's transfer of assets prior to the application of the indirect stock transfer rules. However, section 367(a) and (d) do not apply to the domestic corporation's transfer to the extent that the foreign acquiring corporation re-transfers the assets received in the asset transfer to a controlled domestic corporation, provided that the controlled domestic corporation's basis in the assets is no greater than the basis that the domestic acquired corporation had in such assets.

The 2005 proposed regulations would modify the scope of the coordination rule as it applies to asset reorganizations such that section 367(a) and (d) generally would apply to the domestic corporation's transfer of assets to the foreign corporation, even if the foreign corporation re-transfers all or part of the assets received to a domestic corporation in a controlled asset transfer. However, the 2005 proposed regulations would provide two exceptions to this general rule. The first exception generally would apply if the domestic acquired corporation is controlled (within the meaning of section 368(c)) by 5 or fewer domestic corporations, appropriate basis adjustments as provided in section 367(a)(5) are made to the stock of the foreign acquiring corporation, and any other conditions as provided in regulations under section 367(a)(5) are satisfied.

The second exception would apply if the controlled domestic corporation's basis in the assets is no greater than the domestic acquired corporation's basis in such assets and the following two

conditions are satisfied: (1) The indirect transfer of stock of the domestic acquired corporation satisfies the requirements of § 1.367(a)–3(c)(1)(i), (ii), and (iv), and (c)(6); and (2) the domestic acquired corporation attaches a statement to its tax return for the taxable year of the transfer. The statement must certify that the domestic acquired corporation will recognize gain (as described below) if the foreign acquiring corporation disposes of any stock of the domestic controlled corporation with a principal purpose of avoiding the U.S. tax that would have been imposed on the domestic acquired corporation had it disposed of the re-transferred assets. The 2005 proposed regulations contain a rebuttable presumption that the disposition of stock has a principal purpose of tax avoidance if the disposition occurs within 2 years of the transfer.

When applicable, under this second exception, the domestic acquired corporation would be required to recognize gain as if, immediately prior to the exchange, it had transferred the re-transferred assets, including any intangible assets, directly to a domestic corporation in an exchange qualifying under section 351, and immediately sold the stock to an unrelated party for its fair market value in a transaction in which it recognizes gain, if any (but not loss). The 2005 proposed regulations would provide that the basis that the foreign acquiring corporation has in the stock of the domestic controlled corporation is increased immediately prior to its disposition by the amount of gain recognized by the domestic acquired corporation. However, the basis of the re-transferred assets held by the domestic controlled corporation would not be increased by such gain.

Several comments were received with respect to the second exception. Commentators stated that the final regulations should provide that the amount of gain recognized by the domestic acquired corporation under the second exception should also increase the basis of the re-transferred assets held by the domestic controlled corporation. As stated in the preamble to the 2005 proposed regulations, the IRS and Treasury believe that the concerns raised by the construct that results from a controlled asset transfer to a domestic subsidiary after an outbound asset transfer are analogous to the concerns raised in other divisive transactions where gain is recognized on the stock of a corporation without a corresponding increase in the basis of the assets of such corporation. See section 355(e) and § 1.367(e)–2(b)(2)(iii). The tax consequences set forth in the final regulations are intended to be consistent with the tax consequences that result in these other transactions. As a result, the final regulations do not adopt this comment.

Commentators also questioned whether the proposed modification to the coordination rule is necessary in light of the enactment of section 7874 and whether any new limitations to the rule should await an analysis of how section 7874 affects the rules of § 1.367(a)–3(c). Because of the divisive concerns present in these types of transactions, the IRS and Treasury believe that the modifications to the coordination rule continue to be necessary and therefore are retained. Nevertheless, the IRS and Treasury are studying the effect of section 7874 on the coordination rule, as well as the direct and indirect transfer of domestic stock under § 1.367(a)–3(c). The results of this study may be addressed in a future regulation project.

Finally, in light of the enactment of section 7874, *Example 6D* of § 1.367(a)–3(d)(3) of the 2005 proposed regulations has not been retained. Compare § 1.367(a)–3(d)(3) *Example 6B.*

G. Treatment of a Controlled Asset Transfer Following a Section 368(a)(1)(F) Reorganization as an Indirect Stock Transfer

The 2005 proposed regulations would revise § 1.367(a)–3(d)(1)(v) so that any non-triangular asset reorganization followed by a controlled asset transfer will be considered an indirect stock transfer under § 1.367(a)–3(d)(1).

Commentators stated, however, that a section 368(a)(1)(F) reorganization followed by a controlled asset transfer should not be treated as an indirect stock transfer. According to the commentators, because a section 368(a)(1)(F) reorganization involves only a ''single'' corporation, it should be treated in effect as a ''non-event'' for purposes of the indirect stock transfer rules. As a result, the commentators believe that the transaction should be treated as a mere section 351 transfer of assets to the controlled subsidiary and not as an indirect stock transfer.

In response to this comment, the final regulations exclude from the application of the indirect stock transfer rules *same-country 368(a)(1)(F) reorganizations* followed by controlled asset transfers. For this purpose, a same-country section 368(a)(1)(F) reorganization is a reorganization described in section 368(a)(1)(F) in which both the acquired corporation and the acquiring corporation are foreign corporations and are created or organized under the laws of the same foreign country. This would include, for example, situations where the foreign corporation changes its name, changes its location within the foreign country, or changes its form within the foreign country. The IRS and Treasury will continue to examine whether other foreign-to-foreign section 368(a)(1)(F) reorganizations followed by controlled asset transfers should be treated as indirect stock transfers, however, as the general treatment of section 368(a)(1)(F) reorganizations is further considered. Outbound reorganizations under section 368(a)(1)(F) followed by controlled asset transfers are treated as indirect stock transfers under the final regulations. See § 1.367(a)–1T(f).

H. Treatment of Reorganizations Described in Section 368(a)(1)(G) and (a)(2)(D) as Indirect Stock Transfers

Section 368(a)(2)(D) provides that the acquisition by one corporation, in exchange for stock of a corporation which is in control of the acquiring corporation, of substantially all the properties of another corporation does not disqualify a transaction from qualifying as a reorganization under section 368(a)(1)(A) or 368(a)(1)(G), provided certain conditions are satisfied.

Section 1.367(a)–3(d)(1)(i) and (iv) of the 2005 proposed regulations would treat certain reorganizations described in section 368(a)(1)(A) and (a)(2)(D), and certain triangular reorganizations described in section 368(a)(1)(C), respectively, as indirect stock transfers. Moreover, section 1.367(a)–3(d)(1)(v) of the 2005 proposed regulations would include certain reorganizations described in section 368(a)(1)(G), followed by controlled asset transfers, as indirect stock transfers. The 2005 proposed regulations would not explicitly treat reorganizations described in section 368(a)(1)(G) and (a)(2)(D) as indirect stock transfers, even though they have the same effect as these other reorganizations. As a result, the final regulations modify § 1.367(a)–3(d)(1)(i), and related provisions, to include as indirect stock transfers certain reorganizations described in section 368(a)(1)(G) and (a)(2)(D). Similar modifications are made in other sections of the final regulations to take into account reorganizations described in section 368(a)(1)(G) and (a)(2)(D).

I. General Operation of Section 367 Regulations and the Effect of Section 7874

Comments were received regarding the scope of certain portions of the section 367 regulations in light of the enactment of section 7874. In response

to the potential overlap of these two provisions, the IRS and Treasury are considering possible changes to § 1.367(a)–3(c). Comments are requested as to the interaction of section 7874 and § 1.367(a)–3(c), as well as to other aspects of the section 367 regulations.

J. Section 6038B Reporting

Section 6038B provides for reporting by U.S. persons that transfer property to foreign corporations in an exchange described in section 332, 351, 354, 355, 356, or 361. Temporary regulations under section 6038B provide an exception from reporting for certain transactions described in § 1.367(a)–3(a). Section 1.367(a)–3(a) provides an exception to section 367(a) for certain exchanges under section 354 or 356 of stock or securities in section 368(a)(1)(E) reorganizations or in asset reorganizations that are not indirect stock transfers. These exceptions from reporting under section 6038B have been amended to conform to the amendments to § 1.367(a)–3(a). These exceptions are incorporated in the final regulations. See Part B. of this preamble.

Section 6038B and the regulations thereunder provide for reporting by filing Form 926 ''Return by a U.S. Transferor of Property to a Foreign Corporation'' and any attachments with the income tax return for the year of the transfer. Temporary regulations under section 6038B eliminate the requirement to sign Form 926, thus permitting the electronic filing of the form with the U.S. transferor's federal income tax return. The temporary regulations provide that Form 926 and any attachments are verified by signing the income tax return with which the form and attachments are filed. These temporary regulations are incorporated in these final regulations, except with respect to certain filings by corporations which will be addressed as part of a larger final regulation dealing with electronic filing.

K. Effective Dates

1. General Rule

Except as provided below, the final regulations apply to transactions occurring on or after January 23, 2006.

2. Retroactive Application of § 1.367(b)–4(b)(1)(ii) of the Proposed Regulations

Under § 1.367(b)–4(b), certain shareholders of a foreign acquired corporation are required to include in income as a deemed dividend the section 1248 amount with respect to the stock of the foreign acquired corporation if such exchange results in the loss of section 1248 shareholder status. This may occur, for example, if the exchanging shareholder receives domestic stock in exchange for the stock of an acquired foreign corporation in a triangular reorganization where a domestic issuing corporation controls the foreign acquiring corporation.

The current regulations consider the section 1248 shareholder status to be lost in this case because the domestic acquiring corporation's basis in the foreign acquiring corporation is generally determined by reference to the assets of the foreign acquired corporation, rather than by reference to the stock of the foreign acquired corporation. See § 1.358–6. Under the 2005 proposed regulations, however, such an exchanging shareholder would not be required to include in income as a deemed dividend the section 1248 amount under § 1.367(b)–4(b), provided that the domestic issuing corporation, immediately after the exchange, is a section 1248 shareholder of the acquired corporation (in the case of a triangular section 368(a)(1)(B) reorganization) or the surviving corporation (in the case of a triangular section 368(a)(1)(C) reorganization, a forward triangular merger, a reorganization described in section 368(a)(1)(G) and (a)(2)(D), or a reverse triangular merger) and such acquired or surviving corporation is a controlled foreign corporation. This change was made in the case of triangular asset reorganizations because the special basis rules in § 1.367(b)–13(c) of the 2005 proposed regulations would preserve the section 1248 amounts attributable to the stock of the foreign acquired corporation in the stock of the foreign acquiring (or surviving) corporation held by the domestic issuing corporation. The special basis rules would not apply to triangular reorganizations under section 368(a)(1)(B). The special basis rules are not needed for these transactions because section 1248 amounts are preserved under the general rules of § 1.358–6.

Commentators requested that the modification to § 1.367(b)–4 relating to triangular section 368(a)(1)(B) reorganizations be made retroactive to February 23, 2000, the date on which § 1.367(b)–4 was promulgated, because the basis rules of § 1.358–6 were in effect at that time and the transactions never raised concerns about preserving section 1248 amounts. The IRS and Treasury agree with this comment and therefore the final regulations allow taxpayers to apply the modification to § 1.367(b)–4 to a triangular section 368(a)(1)(B) reorganization occurring on or after February 23, 2000, and during any taxable year which is not closed by the period of limitations. Taxpayers applying this rule, however, must do so consistently with respect to all such transactions.

Commentators also requested that the modification to § 1.367(b)–4 apply to other triangular reorganizations on a retroactive basis, on the condition that taxpayers also apply the special basis rules of § 1.367(b)–13(c) of the 2005 proposed regulations retroactively to these transactions. The IRS and Treasury only intend for the § 1.367(b)–13(c) basis rules to apply on a prospective basis. Elective application of these rules to prior years would be complex and difficult to administer. Accordingly, the IRS and Treasury have not adopted this comment for other triangular reorganizations.

3. Exchanges of Securities in Certain Recapitalizations and Reorganizations

As stated above in part B.2. of this preamble, the final regulations provide an exception to the application of section 367(a) to transfers of securities by U.S. persons in a section 354 or 356 exchange pursuant to a section 368(a)(1)(E) reorganization, or a section 368(a)(1) asset reorganization that is not treated as an indirect stock transfer. This rule applies to transfers occurring after January 5, 2005, although taxpayers may apply the rule to transfers of securities occurring on or after July 20, 1998, and on or before January 5, 2005, if done consistently to all transactions.

4. Asset Reorganizations Followed by Controlled Asset Transfers

Commentators stated that because the 2005 proposed regulations did not provide an effective date for the rule that treats a section 368(a)(1)(F) reorganization followed by a controlled asset transfer as an indirect stock transfer, such rule could be interpreted as applying to transactions occurring on or after July 20, 1998, which is the general effective date of § 1.367(a)–3(d). The final regulations clarify that a section 368(a)(1)(F) reorganization followed by a controlled asset transfer is treated as an indirect stock transfer subject to section 367(a) only if the reorganization occurs on or after January 23, 2006.

In general, section 368(a)(1)(D) reorganizations followed by controlled asset transfers are treated as indirect stock transfers subject to section 367(a) if the reorganization occurs after December 9, 2002. However, see Rev. Rul. 2002–85 (2002–2 C.B. 986), for special retroactive applicability dates.

5. Electronic Filing Under Section 6038B

These final regulations provide that Form 926 and any attachments will be verified by signing the income tax return with which the form and attachments are filed, in order to facilitate the electronic filing of Form 926 with the transferor's income tax return. This rule applies to taxable years beginning after December 31, 2002. For taxable years beginning before January 1, 2003, Form 926 must be signed under penalties of perjury declaring that the information submitted is true, correct and complete to the best of the transferor's knowledge and belief.

Special Analyses

It has been determined that this Treasury Decision is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations, and because the regulations do not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Code, the notice of proposed rulemaking preceding these regulations was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Drafting Information

The principal author of these regulations is Robert W. Lorence, Jr., of the Office of Associate Chief Counsel (International). However, other personnel from the IRS and Treasury participated in their development.

List of Subjects

26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

26 CFR Part 602

Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

■ Accordingly, 26 CFR parts 1 and 602 are amended as follows:

PART 1—INCOME TAXES

■ **Paragraph 1.** The authority citation for part 1 continues to read, in part, as follows:

Authority: 26 U.S.C. 7805 * * *

§ 1.367(a)–3(b) also issued under 26 U.S.C. 367(a) * * *

§ 1.367(b)–13 also issued under 26 U.S.C. 367(b) * * *

■ **Par. 2.** In § 1.358–6, paragraph (e) is amended by adding a sentence at the end of the paragraph to read as follows:

§ 1.358–6 Stock basis in certain triangular reorganizations

* * * * *

(e) * * * For certain triangular reorganizations where the surviving corporation (S or T) is foreign, see § 1.367(b)–13.

* * * * *

■ **Par. 3.** Section 1.367(a)–3 is amended as follows:

■ 1. In paragraph (a), remove the third and fourth sentences, and add five sentences in their place.

■ 2. In paragraph (a), add a sentence at the end of the paragraph.

■ 3. Revise paragraph (b)(2)(i).

■ 4. Revise paragraph (c)(5)(vi).

■ 5. Revise paragraph (d)(1), introductory text.

■ 6. Revise paragraph (d)(1)(i).

■ 7. In paragraph (d)(1)(ii), add a sentence at the end of the paragraph.

■ 8. Revise paragraph (d)(1)(iii).

■ 9. In paragraph (d)(1)(iv), remove the language ''*Example 5*'' and add ''*Example 6*'' in its place, remove ''*Example 7*'' and add ''*Example 8*'' in its place, and remove ''*Example 11*'' and add ''*Example 14*'' in its place.

■ 10. Revise paragraph (d)(1)(v).

■ 11. In paragraph (d)(1)(vi), remove the language ''*Example 10* and *Example 10A*'' and add ''*Example 13* and *Example 13A*'' in its place.

■ 12. Revise paragraphs (d)(2)(i), (ii), and (iv).

■ 13. Revise paragraph (d)(2)(v)(A) and (C).

■ 14. Redesignate paragraph (d)(2)(v)(D) as paragraph (d)(2)(v)(F).

■ 15. Add new paragraphs (d)(2)(v)(D) and (E).

■ 16. Revise paragraph (d)(2)(vi).

■ 17. Add new paragraph (d)(2)(vii).

■ 18. In paragraph (d)(3), remove the first sentence, and add two sentences in its place.

■ 19. In paragraph (d)(3), redesignate the examples as follows and add the following new examples:

Redesignate	As	Add
Example 12 ..	*Example 16.*	
		Example 15.
Examples 11 and *11A.*	*Examples 14* and *14A.*	
Examples 10 and *10A.*	*Examples 13* and *13A.*	
Example 9	*Example 12.*	
		Examples 10 and 11.
Example 8	*Example 9.*	
Examples 7, 7A, 7B, and *7C.*	*Examples 8, 8A, 8B,* and *8C.*	
Examples 6 and *6A.*	*Examples 7* and *7A.*	
		Example 6C.
Examples 5, 5A, and *5B.*	*Examples 6, 6A,* and *6B.*	
		Example 5A.
Example 4	*Example 5.*	
Example 3	*Example 4.*	
Example 2	*Example 3.*	
		Example 2.

■ 20. In paragraph (d)(3), newly designated *Example 3,* the heading and paragraph (i) are revised.

■ 21. In paragraph (d)(3), newly designated *Example 5,* paragraph (i), remove the language ''paragraph (d)(1)(iii)'' and add ''paragraph (d)(1)(iii)(A)'' in its place.

■ 22. In paragraph (d)(3), newly designated *Example 5,* paragraph (ii), last sentence, remove the language '', or if S sold all or a portion of the stock of Y''.

■ 23. In paragraph (d)(3), newly designated *Example 6A,* paragraph (i), the first and last sentences, and paragraph (ii), the first, fourth, and fifth sentences are revised.

■ 24. In paragraph (d)(3), newly designated *Example 6B* is revised.

■ 25. In paragraph (d)(3), newly designated *Example 8,* paragraph (ii), the fourth sentence is revised.

■ 26. In paragraph (d)(3), newly designated *Example 9* is revised.

■ 27. In paragraph (d)(3), newly designated *Example 12,* paragraph (ii), the fifth sentence is revised.

■ 28. In paragraph (d)(3), revise newly designated *Example 16.*

■ 29. In paragraph (d)(3), for each of the newly designated examples listed in the first column, replace the language in the second column with the language in the third column:

Redesignated examples	Remove	Add
Example 7, paragraph (i).	*Example 5*	*Example 6.*
Example 7A, paragraph (i) and paragraph (ii), penultimate sentence.	*Example 6*	*Example 7.*
Example 8, paragraph (i).	*Example 5*	*Example 6.*
Example 8A, paragraph (i).	*Example 7*	*Example 8.*

Redesignated examples	Remove	Add
Example 8B, paragraph (i).	*Example 7*	*Example 8.*
Example 8C, paragraph (i).	*Example 7*	*Example 8.*
Example 12, paragraph (i), third sentence.	*Example 9*	*Example 12.*
Example 13A, paragraph (i) and paragraph (ii), first sentence.	*Example 10* ..	*Example 13.*
Example 14A, paragraph (i).	*Example 11* ..	*Example 14.*

■ 30. Paragraph (e)(1) is revised.

The revisions and additions are as follows:

§ 1.367(a)–3 Treatment of transfers of stock or securities to foreign corporations.

* * * * *

(a) * * * However, if, in an exchange described in section 354 or 356, a U.S. person exchanges stock or securities of a foreign corporation in a reorganization described in section 368(a)(1)(E), or a U.S. person exchanges stock or securities of a domestic or foreign corporation pursuant to an asset reorganization that is not treated as an indirect stock transfer under paragraph (d) of this section, such section 354 or 356 exchange is not a transfer to a foreign corporation subject to section 367(a). See paragraph (d)(3) *Example 16* of this section. For purposes of this section, an asset reorganization is defined as a reorganization described in section 368(a)(1) involving a transfer of assets under section 361. If, in a transfer described in section 361, a domestic merging corporation transfers stock of a controlling corporation to a foreign surviving corporation in a reorganization described in sections 368(a)(1)(A) and (a)(2)(E), such section 361 transfer is not subject to section 367(a) if the stock of the controlling corporation is provided to the merging corporation by the controlling corporation pursuant to the plan of reorganization; a section 361 transfer of other property, including stock of the controlling corporation not provided by the controlling corporation pursuant to the plan of reorganization, by the domestic merging corporation to the foreign surviving corporation pursuant to such a reorganization is subject to section 367(a). For special basis and holding period rules involving foreign corporations that are parties to certain triangular reorganizations under section 368(a)(1), see § 1.367(b)–13. * * * For rules related to expatriated entities, see section 7874 and the regulations thereunder.

(b) * * *

(2) * * *

(i) *In general.* A transfer of foreign stock or securities described in section 367(a) or the regulations thereunder as well as in section 367(b) or the regulations thereunder shall be subject concurrently to sections 367(a) and (b) and the regulations thereunder, except as provided in paragraph (b)(2)(i)(A) or (B) of this section. See paragraph (d)(3) *Examples 11* and *14* of this section.

(A) Section 367(b) and the regulations thereunder shall not apply if a foreign corporation is not treated as a corporation under section 367(a)(1). See the example in paragraph (b)(2)(ii) of this section and paragraph (d)(3) *Example 14* of this section.

(B) If a foreign corporation transfers assets to a domestic corporation in a transaction to which § 1.367(b)–3(a) and (b) and the indirect stock transfer rules of paragraph (d) of this section apply, and all the earnings and profits amount attributable to the stock of an exchanging shareholder under § 1.367(b)–3(b) is greater than the amount of gain in such stock subject to section 367(a) pursuant to the indirect stock transfer rules of paragraph (d) of this section, then the rules of section 367(b), and not the rules of section 367(a), shall apply to the exchange. See paragraph (d)(3) *Example 15* of this section.

* * * * *

(c) * * *

(5) * * *

(vi) *Transferee foreign corporation.* Except as provided in paragraph (d)(2)(i)(B) of this section, a transferee foreign corporation is the foreign corporation whose stock is received in the exchange by U.S. persons.

* * * * *

(d) * * *

(1) *In general.* For purposes of this section, a U.S. person who exchanges, under section 354 (or section 356) stock or securities in a domestic or foreign corporation for stock or securities in a foreign corporation (or in a domestic corporation in control of a foreign acquiring corporation in a triangular section 368(a)(1)(B) reorganization) in connection with a transaction described in paragraphs (d)(1)(i) through (v) of this section (or who is deemed to make such an exchange under paragraph (d)(1)(vi) of this section) shall, except as provided in paragraph (d)(2)(vii) of this section, be treated as having made an indirect transfer of such stock or securities to a foreign corporation that is subject to the rules of this section, including, for example, the requirement, where applicable, that the U.S. transferor enter into a gain recognition agreement to preserve nonrecognition treatment under section 367(a). If the U.S. person exchanges stock or securities of a foreign corporation, see also section 367(b) and the regulations thereunder. For examples of the concurrent application of the indirect stock transfer rules under section 367(a) and the rules of section 367(b), see paragraph (d)(3) *Examples 14* and *15* of this section. For purposes of this paragraph (d), if a corporation acquiring assets in an asset reorganization transfers all or a portion of such assets to a corporation controlled (within the meaning of section 368(c)) by the acquiring corporation as part of the same transaction, the subsequent transfer of assets to the controlled corporation will be referred to as a controlled asset transfer. See section 368(a)(2)(C).

(i) *Mergers described in sections 368(a)(1)(A) and (a)(2)(D) and reorganizations described in sections 368(a)(1)(G) and (a)(2)(D).* A U.S. person exchanges stock or securities of a corporation (the acquired corporation) for stock or securities of a foreign corporation that controls the acquiring corporation in a reorganization described in either sections 368(a)(1)(A) and (a)(2)(D), or in sections 368(a)(1)(G) and (a)(2)(D). See paragraph (d)(3) *Example 1* of this section for an example of a reorganization described in sections 368(a)(1)(A) and (a)(2)(D) involving domestic acquired and acquiring corporations, and see paragraph (d)(3) *Example 10* of this section for an example involving a domestic acquired corporation and a foreign acquiring corporation.

(ii) * * * See paragraph (d)(3) *Example 2* of this section for an example of a reorganization described in sections 368(a)(1)(A) and (a)(2)(E) involving domestic acquired and acquiring corporations, and see paragraph (d)(3) *Example 11* of this section for an example involving a domestic acquired corporation and a foreign acquiring corporation.

(iii) *Triangular reorganizations described in section 368(a)(1)(B)*—(A) A U.S. person exchanges stock or securities of the acquired corporation for voting stock or securities of a foreign corporation that is in control (as defined in section 368(c)) of the acquiring corporation in a reorganization described in section 368(a)(1)(B). See paragraph (d)(3) *Example 5* of this section.

(B) A U.S. person exchanges stock or securities of the acquired corporation for voting stock or securities of a domestic corporation that is in control (as defined in section 368(c)) of a foreign acquiring corporation in a reorganization described in section 368(a)(1)(B). See paragraph (d)(3) *Example 5A* of this section.

* * * * *

(v) *Transfers of assets to subsidiaries in certain section 368(a)(1) reorganizations.* A U.S. person exchanges stock or securities of a corporation (the acquired corporation) for stock or securities of a foreign acquiring corporation in an asset reorganization (other than a triangular section 368(a)(1)(C) reorganization described in paragraph (d)(1)(iv) of this section, a reorganization described in sections 368(a)(1)(A) and (a)(2)(D) or sections 368(a)(1)(G) and (a)(2)(D) described in paragraph (d)(1)(i) of this section, a reorganization described in sections 368(a)(1)(A) and (a)(2)(E) described in paragraph (d)(1)(ii) of this section, or a same-country section 368(a)(1)(F) reorganization) that is followed by a controlled asset transfer. For purposes of this section, a same-country section 368(a)(1)(F) reorganization is a reorganization described in section 368(a)(1)(F) in which both the acquired corporation and the acquiring corporation are foreign corporations and are created or organized under the laws of the same foreign country. In the case of a transaction described in this paragraph (d)(1)(v) in which some but not all of the assets of the acquired corporation are transferred in a controlled asset transfer, the transaction shall be considered to be an indirect transfer of stock or securities subject to this paragraph (d) only to the extent of the assets so transferred. The remaining assets shall be treated as having been transferred by the acquired corporation in an asset transfer rather than an indirect stock transfer, and, if the acquired corporation is a domestic corporation, such asset transfer shall be subject to the other provisions of section 367, including sections 367(a)(1), (3), and (5), and (d). See paragraph (d)(3) *Examples 6A* and *6B* of this section.

* * * * *

(2) * * *

(i) *Transferee foreign corporation*—(A) *General rule.* Except as provided in paragraph (d)(2)(i)(B) of this section, the transferee foreign corporation shall be the foreign corporation that issues stock or securities to the U.S. person in the exchange.

(B) *Special rule for triangular reorganizations described in paragraph (d)(1)(iii)(B) of this section.* In the case of a triangular reorganization described in paragraph (d)(1)(iii)(B) of this section, the transferee foreign corporation shall be the foreign acquiring corporation. See paragraph (d)(3) *Example 5A* of this section.

(ii) *Transferred corporation.* The transferred corporation shall be the acquiring corporation, except as provided in this paragraph (d)(2)(ii). In the case of a triangular section 368(a)(1)(B) reorganization described in paragraph (d)(1)(iii) of this section, the transferred corporation shall be the acquired corporation. In the case of an indirect stock transfer described in paragraph (d)(1)(i), (ii), or (iv) of this section followed by a controlled asset transfer, or an indirect stock transfer described in paragraph (d)(1)(v) of this section, the transferred corporation shall be the controlled corporation to which the assets are transferred. In the case of successive section 351 transfers described in paragraph (d)(1)(vi) of this section, the transferred corporation shall be the corporation to which the assets are transferred in the final section 351 transfer. The transferred property shall be the stock or securities of the transferred corporation, as appropriate under the circumstances.

* * * * *

(iv) *Gain recognition agreements involving multiple parties.* The U.S. transferor's agreement to recognize gain, as provided in § 1.367(a)–8, shall include appropriate provisions consistent with the principles of these rules, including a requirement that the transferor recognize gain in the event of a direct or indirect disposition of the stock or assets of the transferred corporation. For example, in the case of a triangular section 368(a)(1)(B) reorganization described in paragraph (d)(1)(iii)(A) of this section, a disposition of the transferred stock or securities requiring the U.S. transferor to recognize gain shall include a direct or indirect disposition of such stock or securities by the transferee foreign corporation, such as a disposition of such stock or securities by a foreign acquiring corporation or a disposition of the stock of the acquiring corporation (either foreign or domestic) by the transferee foreign corporation. In the case of a triangular section 368(a)(1)(B) reorganization described in paragraph (d)(1)(iii)(B) of this section, a disposition of the transferred stock or securities requiring the U.S. transferor to recognize gain shall occur, for example, upon the disposition of such stock or securities by the acquiring corporation. Moreover, a disposition of the stock of the acquiring corporation by the domestic issuing corporation in a taxable transaction shall, for example, terminate the gain recognition agreement. See § 1.367(a)–8(h)(1) and paragraph (d)(3) *Examples 5* and *5A* of this section.

(v) * * *

(A) In the case of a reorganization described in paragraph (d)(1)(i) of this section (a reorganization described in sections 368(a)(1)(A) and (a)(2)(D) or sections 368(a)(1)(G) and (a)(2)(D)) or a reorganization described in section (d)(1)(iv) of this section (a triangular section 368(a)(1)(C) reorganization), the assets of the acquired corporation;

* * * * *

(C) In the case of an asset reorganization followed by a controlled asset transfer, as described in paragraph (d)(1)(v) of this section, the assets of the acquired corporation that are transferred to the corporation controlled by the acquiring corporation;

(D) In the case of a triangular reorganization described in section 368(a)(1)(C) followed by a controlled asset transfer, a reorganization described in sections 368(a)(1)(A) and (a)(2)(D) followed by a controlled asset transfer, or a reorganization described in sections 368(a)(1)(G) and (a)(2)(D) followed by a controlled asset transfer, the assets of the acquired corporation including those transferred to the corporation controlled by the acquiring corporation;

(E) In the case of a reorganization described in sections 368(a)(1)(A) and (a)(2)(E) followed by a controlled asset transfer, the assets of the acquiring corporation including those transferred to the corporation controlled by the acquiring corporation; and

* * * * *

(vi) *Coordination between asset transfer rules and indirect stock transfer rules*—(A) *General rule.* Except as otherwise provided in this paragraph (d)(2)(vi), if, pursuant to any of the transactions described in paragraph (d)(1) of this section, a U.S. person transfers (or is deemed to transfer) assets to a foreign corporation in an exchange described in section 351 or section 361, the rules of section 367, including sections 367(a)(1), (a)(3), and (a)(5), as well as section 367(d), and the regulations thereunder shall apply prior to the application of the rules of this section.

(B) *Exceptions.* (*1*) If a transaction is described in paragraph (d)(2)(vi)(A) of this section, sections 367(a) and (d) shall not apply to the extent a domestic corporation (domestic acquired corporation) transfers its assets to a foreign corporation (foreign acquiring

corporation) in an asset reorganization, and such assets (re-transferred assets) are transferred to a domestic corporation (domestic controlled corporation) in a controlled asset transfer, provided that the domestic controlled corporation's basis in such assets is no greater than the basis that the domestic acquired corporation had in such assets and the conditions contained in either of the following paragraphs are satisfied:

(*i*) The domestic acquired corporation is controlled (within the meaning of section 368(c)) by 5 or fewer domestic corporations, appropriate basis adjustments as provided in section 367(a)(5) are made to the stock of the foreign acquiring corporation, and any other conditions as provided in regulations under section 367(a)(5) are satisfied. For purposes of determining whether the domestic acquired corporation is controlled by 5 or fewer domestic corporations, all members of the same affiliated group within the meaning of section 1504 shall be treated as 1 corporation.

(*ii*) The requirements of paragraphs (c)(1)(i), (ii), and (iv), and (c)(6) of this section are satisfied with respect to the indirect transfer of stock in the domestic acquired corporation, and the domestic acquired corporation attaches a statement described in paragraph (d)(2)(vi)(C) of this section to its U.S. income tax return for the taxable year of the transfer.

(*2*) Sections 367(a) and (d) shall not apply to transfers described in paragraph (d)(1)(vi) of this section where a U.S. person transfers assets to a foreign corporation in a section 351 exchange, to the extent that such assets are transferred by such foreign corporation to a domestic corporation in another section 351 exchange, but only if the domestic transferee's basis in the assets is no greater than the basis that the U.S. transferor had in such assets.

(C) *Required statement.* The statement required by paragraph (d)(2)(vi)(B)(*1*)(*ii*) of this section shall be entitled ''Required Statement under § 1.367(a)–3(d) for Assets Transferred to a Domestic Corporation'' and shall be signed under penalties of perjury by an authorized officer of the domestic acquired corporation and by an authorized officer of the foreign acquiring corporation. The required statement shall contain a certification that, if the foreign acquiring corporation disposes of any stock of the domestic controlled corporation in a transaction described in paragraph (d)(2)(vi)(D) of this section, the domestic acquired corporation shall recognize gain as described in paragraph (d)(2)(vi)(E) of this section. The domestic acquired corporation (or the foreign acquiring corporation on behalf of the domestic acquired corporation) shall file a U.S. income tax return (or an amended U.S. tax return, as the case may be) for the year of the transfer reporting such gain.

(D) *Gain recognition transaction.* (*1*) A transaction described in this paragraph (d)(2)(vi)(D) is one where a principal purpose of the transfer by the domestic acquired corporation is the avoidance of U.S. tax that would have been imposed on the domestic acquired corporation on the disposition of the re-transferred assets. A transfer may have a principal purpose of tax avoidance even though the tax avoidance purpose is outweighed by other purposes when taken together.

(*2*) For purposes of paragraph (d)(2)(vi)(D)(*1*) of this section, a transaction is deemed to have a principal purpose of tax avoidance if the foreign acquiring corporation disposes of any stock of the domestic controlled corporation (whether in a recognition or non-recognition transaction) within 2 years of the transfer described in paragraph (d)(2)(vi)(A) of this section. The rule in this paragraph (d)(2)(vi)(D)(*2*) shall not apply if the domestic acquired corporation (or the foreign acquiring corporation on behalf of the domestic acquired corporation) demonstrates to the satisfaction of the Commissioner that the avoidance of U.S. tax was not a principal purpose of the transaction.

(E) *Amount of gain recognized and other matters.* (*1*) In the case of a transaction described in paragraph (d)(2)(vi)(D) of this section, solely for purposes of this paragraph (d)(2)(vi)(E), the domestic acquired corporation shall be treated as if, immediately prior to the transfer described in paragraph (d)(2)(vi)(A) of this section, it transferred the re-transferred assets, including any intangible assets, directly to a domestic corporation in exchange for stock of such domestic corporation in a transaction that is treated as a section 351 exchange, and immediately sold such stock to an unrelated party for its fair market value in a sale in which it shall recognize gain, if any (but not loss). Any gain recognized by the domestic acquired corporation pursuant to this paragraph (d)(2)(vi)(E) will increase the basis that the foreign acquiring corporation has in the stock of the domestic controlled corporation immediately before the transaction described in paragraph (d)(2)(vi)(D) of this section, but will not increase the basis of the re-transferred assets held by the domestic controlled corporation. Section 1.367(d)–1T(g)(6) shall not apply with respect to any intangible property included in the re-transferred assets described in this paragraph.

(*2*) If additional tax is required to be paid as a result of a transaction described in paragraph (d)(2)(vi)(D) of this section, then interest must be paid on that amount at rates determined under section 6621 with respect to the period between the date prescribed for filing the domestic acquired corporation's income tax return for the year of the transfer and the date on which the additional tax for that year is paid.

(F) *Examples.* For illustrations of the rules in paragraph (d)(2)(vi) of this section, see paragraph (d)(3) *Examples 6B, 6C, 9,* and *13A* of this section.

(vii) *Change in status of a domestic acquired corporation to a foreign corporation.* (A) A U.S. person that exchanges stock or securities of a domestic corporation for stock or securities of a foreign corporation under section 354 (or section 356) will be treated for purposes of this section as having made an indirect stock transfer of the stock or securities of a foreign corporation (and not of a domestic corporation) to a foreign corporation under paragraph (b) of this section (but not paragraph (c) of this section), if the acquired domestic corporation is a subsidiary member (within the meaning of § 1.1502–1(c)) of a consolidated group (within the meaning of § 1.1502–1(h)) immediately before the transaction, and if the transaction is either of the following:

(*1*) Described in paragraph (d)(1)(i) or (iv) of this section, but only if the acquiring corporation is foreign. See paragraph (d)(3) *Examples 8, 9, 10* and *12* of this section.

(*2*) Described in paragraph (d)(1)(v) of this section, but only to the extent the controlled asset transfer is to a foreign corporation. See paragraph (d)(3) *Example 6A* of this section.

(B) The rules of paragraph (d)(2)(vii)(A) of this section will not apply to the extent assets transferred to the foreign acquiring corporation in a transaction described in paragraph (d)(2)(vii)(A)(*1*) of this section, or assets transferred to a foreign corporation in a controlled asset transfer in a transaction described in paragraph (d)(2)(vii)(A)(*2*) of this section, are retransferred to a domestic controlled corporation in one or more successive transfers as part of the same transaction. See paragraph (d)(3) *Example 9* of this section.

(3) * * * The rules of this paragraph (d) and § 1.367(a)–8 are illustrated by the following examples. For purposes of these examples, assume section 7874 does not apply.

* * * * *

Example 2. Section 368(a)(1)(A)/(a)(2)(E) reorganization—(i) *Facts.* The facts are the same as in *Example 1,* except that Newco merges into W and Newco receives stock of W which it distributes to F in a reorganization described in sections 368(a)(1)(A) and (a)(2)(E). Pursuant to the reorganization, A receives 40 percent of the stock of F in an exchange described in section 354.

(ii) *Result.* The consequences of the transfer are similar to those described in *Example 1.* Pursuant to paragraph (d)(1)(ii) of this section, A is considered to have transferred its W stock to F pursuant to the indirect stock transfer rules. F is treated as the transferee foreign corporation, and W is treated as the transferred corporation. Provided that the requirements of paragraph (c)(1) of this section are satisfied, including the requirement that A enter into a five-year gain recognition agreement as described in § 1.367(a)–8, A's exchange of W stock for F stock under section 354 will not be subject to section 367(a)(1).

Example 3. Taxable transaction pursuant to indirect stock transfer rules—(i) *Facts.* The facts are the same as in *Example 1*, except that A receives 55 percent of either the total voting power or the total value of the stock of F in the transaction.

* * * * *

Example 5A. Triangular section 368(a)(1)(B) reorganization—(i) *Facts.* The facts are the same as in *Example 5*, except that F is a domestic corporation and S is a foreign corporation.

(ii) *Result.* U's exchange of Y stock for stock of F, a domestic corporation in control of S, the foreign acquiring corporation, is treated as an indirect transfer of Y stock to a foreign corporation under paragraph (d)(1)(iii)(B) of this section. U's exchange of Y stock for F stock will not be subject to section 367(a)(1) provided that all of the requirements of paragraph (c)(1) of this section are satisfied, including the requirement that U enter into a five-year gain recognition agreement. In satisfying the 50 percent or less ownership requirements of paragraphs (c)(1)(i) and (ii) of this section, U's indirect ownership of S stock (through its direct ownership of F) will determine whether the requirement of paragraph (c)(1)(i) of this section is satisfied and will be taken into account in determining whether the requirement of paragraph (c)(1)(ii) of this section is satisfied. See paragraph (c)(4)(iv) of this section. For purposes of this section, S is treated as the transferee foreign corporation (see paragraph (d)(2)(i)(B) of this section). The gain recognition agreement would be triggered, for example, if S sold all or a portion of the stock of Y, or if Y sold substantially all of its assets (within the meaning of section 368(a)(1)(C)). In addition, if F disposed of the stock of S in a taxable transaction the gain recognition agreement would be terminated.

* * * * *

Example 6A. Section 368(a)(1)(C) reorganization followed by a controlled asset transfer—(i) *Facts.* The facts are the same as in *Example 6*, except that the transaction is structured as a section 368(a)(1)(C) reorganization with Z transferring its assets to F, followed by a controlled asset transfer, and R is a foreign corporation. * * * F then contributes Businesses B and C to R in a controlled asset transfer.

(ii) *Result.* The transfer of the Business A assets by Z to F does not constitute an indirect stock transfer under paragraph (d) of this section, and, subject to section 367(a)(5), the Business A assets qualify for the section 367(a)(3) active trade or business exception and are not subject to section 367(a). * * * Subject to section 367(a)(5), the Business B assets may qualify for the exception under section 367(a)(3) and § 1.367(a)–2T(c)(2) for assets that will be used by R in an active trade or business outside the United States. Pursuant to paragraphs (d)(1) and (d)(2)(vii)(A)(2) of this section, V is deemed to transfer the stock of a foreign corporation to F in a section 354 exchange subject to the rules of paragraphs (b) and (d) of this section. * * *

* * * * *

Example 6B. Section 368(a)(1)(C) reorganization followed by a controlled asset transfer to a domestic controlled corporation—(i) *Facts.* The facts are the same as in *Example 6A,* except that R is a domestic corporation.

(ii) *Result.* As in *Example 6A,* the outbound transfer of the Business A assets to F is not affected by the rules of this paragraph (d) and is subject to the general rules under section 367. However, subject to section 367(a)(5), the Business A assets qualify for the section 367(a)(3) active trade or business exception and are not subject to section 367(a). The Business B and C assets are part of an indirect stock transfer under this paragraph (d) but must first be tested under section 367(a) and (d). The Business B assets qualify for the active trade or business exception under section 367(a)(3); the Business C assets do not. However, pursuant to paragraph (d)(2)(vi)(B) of this section, the Business B and C assets are not subject to section 367(a) or (d), provided that the basis of the Business B and C assets in the hands of R is no greater than the basis of the assets in the hands of Z, and appropriate basis adjustments are made pursuant to section 367(a)(5) to the stock of F held by V. V also is deemed to make an indirect transfer of Z stock under the rules of paragraph (d) of this section to the extent the assets are transferred to R. To preserve non-recognition treatment under section 367(a), and assuming the other requirements of paragraph (c) of this section are satisfied, V must enter into a 5-year gain recognition agreement in the amount of $50, the amount of the appreciation in the Business B and C assets, as the transfer of such assets by Z was not taxable under section 367(a)(1) and constituted an indirect stock transfer.

Example 6C. Section 368(a)(1)(C) reorganization followed by a controlled asset transfer to a domestic controlled corporation—(i) *Facts.* The facts are the same as in *Example 6B*, except that Z is owned by U.S. individuals, none of whom qualify as five-percent target shareholders with respect to Z within the meaning of paragraph (c)(5)(iii) of this section. The following additional facts are present. No U.S. persons that are either officers or directors of Z own any stock of F immediately after the transfer. F is engaged in an active trade or business outside the United States that satisfies the test set forth in paragraph (c)(3) of this section.

(ii) *Result.* The Business A assets transferred to F are not re-transferred to R and therefore Z's transfer of these assets is not subject to the rules of paragraph (d) of this section. However, the transfer of such assets is subject to gain recognition under section 367(a)(1), because the section 367(a)(3) active trade or business exception is inapplicable pursuant to section 367(a)(5). The Business B and C assets are part of an indirect stock transfer under this paragraph (d) but must first be tested with respect to Z under section 367(a) and (d), as provided in paragraph (d)(2)(vi) of this section. The transfer of the Business B assets (which otherwise would satisfy the section 367(a)(3) active trade or business exception) generally is subject to section 367(a)(1) pursuant to section 367(a)(5). The transfer of the Business C assets generally is subject to section 367(a)(1) because these assets do not qualify for the active trade or business exception under section 367(a)(3). However, pursuant to paragraph (d)(2)(vi)(B) of this section, the transfer of the Business B and C assets is not subject to sections 367(a)(1) and (d), provided the basis of the Business B and C assets in the hands of R is no greater than the basis in the hands of Z and certain other requirements are satisfied. Even though Z is not controlled within the meaning of section 368(c) by 5 or fewer domestic corporations, Z may avoid immediate gain recognition under section 367(a) and (d) on the transfers of the Business B and Business C assets to F if, pursuant to paragraph (d)(3)(vi)(B) of this section, the indirect transfer of Z stock satisfies the requirements of paragraphs (c)(1)(i), (ii), and (iv), and (c)(6) of this section, and Z attaches a statement described in paragraph (d)(2)(vi)(C) of this section to its U.S. income tax return for the taxable year of the transfer. In general, the statement must contain a certification that, if F disposes of the stock of R (in a recognition or nonrecognition transaction) and a principal purpose of the transfer is the avoidance of U.S. tax that would have been imposed on Z on the disposition of the Business B and C assets transferred to R, then Z (or F on behalf of Z) will file a return (or amended return as the case may be) recognizing gain ($50), as if, immediately prior to the reorganization, Z transferred the Business B and C assets to a domestic corporation in exchange for stock in a transaction treated as a section 351 exchange and immediately sold such stock to an unrelated party for its fair market value. A transaction is deemed to have a principal purpose of U.S. tax avoidance if F disposes of R stock within two years of the transfer, unless Z (or F on behalf of Z) can rebut the presumption to the satisfaction of the Commissioner. See paragraph (d)(2)(vi)(D)(*2*) of this section. With respect to the indirect transfer of Z stock, assume the requirements of paragraphs (c)(1)(i), (ii), and (iv) of this section are satisfied. Thus, assuming Z attaches the statement described in paragraph (d)(2)(vi)(C) of this section to its U.S. income tax return and satisfies the reporting

requirements of (c)(6) of this section, the transfer of Business B and C assets is not subject to immediate gain recognition under section 367(a) or (d).

* * * * *

Example 8. Concurrent application of asset transfer and indirect stock transfer rules in consolidated return setting—(i) *Facts.* * * *

(ii) * * * Pursuant to paragraphs (d)(1) and (d)(2)(vii)(A)(*1*) of this section, V is deemed to transfer the stock of a foreign corporation to F in a section 354 exchange subject to the rules of paragraphs (b) and (d) of this section, and therefore must enter into a gain recognition agreement in the amount of $60 (the gain realized but not recognized by V in the stock of Z after the $40 basis adjustment).

* * * * *

Example 9. Indirect stock transfer by reason of a controlled asset transfer—(i) *Facts.* The facts are the same as in *Example 8,* except that R transfers the Business A assets to M, a wholly owned domestic subsidiary of R, in a controlled asset transfer. In addition, V's basis in its Z stock is $90.

(ii) *Result.* Pursuant to paragraph (d)(2)(vi)(B) of this section, sections 367(a) and (d) do not apply to Z's transfer of the Business A assets to R, because such assets are re-transferred to M, a domestic corporation, provided that the basis of the Business A assets in the hands of M is no greater than the basis of the assets in the hands of Z, and certain other requirements are satisfied. Because Z is controlled (within the meaning of section 368(c)) by V, a domestic corporation, appropriate basis adjustments must be made pursuant to section 367(a)(5) to the stock of F held by V. Section 367(a)(1) does not apply to Z's transfer of its Business B assets to R (which are not re-transferred to M) because such assets qualify for an exception to gain recognition under section 367(a)(3), subject to section 367(a)(5). Pursuant to paragraphs (d)(1) and (d)(2)(vii)(A)(*1*) of this section, V is generally deemed to transfer the stock of a foreign corporation to F in a section 354 exchange subject to the rules of paragraphs (b) and (d) of this section, including the requirement that V enter into a 5-year gain recognition agreement and comply with the requirements of § 1.367(a)–8. However, pursuant to paragraph (d)(2)(vii)(B) of this section, paragraph (d)(2)(vii)(A)(1) of this section does not apply to the extent of the transfer of business A assets by R to M, a domestic corporation. As a result, to the extent of the business A assets transferred by R to M, V is deemed to transfer the stock of Z (a domestic corporation) to F in a section 354 exchange subject to the rules of paragraphs (c) and (d) of this section. Thus, with respect to V's indirect transfer of Z stock to F, such transfer is not subject to gain recognition under section 367(a)(1) if the requirements of paragraph (c) of this section are satisfied, including the requirement that V enter into a 5-year gain recognition agreement and comply with the requirements of § 1.367(a)–8. Under paragraphs (d)(2)(i) and (ii) of this section, the transferee foreign corporation is F and the transferred corporation is M. Pursuant to paragraph (d)(2)(iv) of this section, a disposition by F of the stock of R, or a disposition by R of the stock of M, will trigger the gain recognition agreement. To determine whether an asset disposition constitutes a deemed disposition of the transferred corporation's stock under the rules of § 1.367(a)–8(e)(3)(i), both the Business A assets in M and the Business B assets in R must be considered.

Example 10. Concurrent application of direct stock transfer and indirect stock transfer rules in section 368(a)(1)(A)/(a)(2)(D) reorganization—(i) *Facts.* The facts are the same as in Example 8, except that R acquires all of the assets of Z in a reorganization described in sections 368(a)(1)(A) and (a)(2)(D). Pursuant to the reorganization, V receives 30 percent of the stock of F in a section 354 exchange.

(ii) *Result.* The consequences of the transaction are similar to those in *Example 8.* The assets of Businesses A and B that are transferred to R must be tested under section 367(a) and (d) prior to the consideration of the indirect stock transfer rules of this paragraph (d). The Business B assets qualify for the active trade or business exception under section 367(a)(3), subject to section 367(a)(5). Because the Business A assets do not qualify for the exception, Z must recognize $40 of gain under section 367(a) on the transfer of Business A assets to R. Further, because V and Z file a consolidated return, V's basis in the stock of Z is increased from $100 to $140 as a result of Z's $40 gain. Pursuant to paragraphs (d)(1) and (d)(2)(vii)(A)(*1*) of this section, V is deemed to transfer the stock of a foreign corporation to F in a section 354 exchange subject to the rules of paragraphs (b) and (d) of this section. V's indirect transfer of foreign stock will be taxable under section 367(a) unless V enters into a gain recognition agreement in the amount of $60 ($200 value of Z stock less $140 adjusted basis).

Example 11. Concurrent application of section 367(a) and (b) in section 368(a)(1)(A)/(a)(2)(E) reorganization—(i) *Facts.* F, a foreign corporation, owns all the stock of D, a domestic corporation. V, a domestic corporation, owns all the stock of Z, a foreign corporation. V has a basis of $100 in the stock of Z which has a fair market value of $200. D is an operating corporation with assets valued at $100 with a basis of $60. In a reorganization described in sections 368(a)(1)(A) and (a)(2)(E), D merges into Z, and V exchanges its Z stock for 55 percent of the outstanding F stock.

(ii) *Result.* Under paragraph (d)(1)(ii) of this section, V is treated as making an indirect transfer of Z stock to F. V's exchange of Z stock for F stock will be taxable under section 367(a) (and section 1248 will be applicable) if V fails to enter into a 5-year gain recognition agreement in accordance with the requirements of § 1.367(a)–8. Under paragraph (b)(2) of this section, if V enters into a gain recognition agreement, the exchange will be subject to the provisions of section 367(b) and the regulations thereunder as well as section 367(a). Under § 1.367(b)–4(b), however, no income inclusion is required because both F and Z are controlled foreign corporations with respect to which V is a section 1248 shareholder immediately after the exchange. Under paragraphs (d)(2)(i) and (ii) of this section, the transferee foreign corporation is F, and the transferred corporation is Z (the acquiring corporation). If F disposes (within the meaning of § 1.367(a)–8(e)) of all (or a portion) of Z stock within the 5-year term of the agreement (and V has not made a valid election under § 1.367(a)–8(b)(1)(vii)), V is required to file an amended return for the year of the transfer and include in income, with interest, the gain realized but not recognized on the initial section 354 exchange. To determine whether Z (the transferred corporation) disposes of substantially all of its assets, only the assets of Z immediately prior to the transaction are taken into account, pursuant to paragraph (d)(2)(v)(B) of this section. Because D is owned by F, a foreign corporation, section 367(a)(5) precludes any assets of D from qualifying for nonrecognition under section 367(a)(3). Thus, D recognizes $40 of gain on the transfer of its assets to Z under section 367(a)(1).

Example 12. Concurrent application of direct and indirect stock transfer rules—(i) *Facts.* * * *

(ii) * * * Pursuant to paragraphs (d)(1) and (d)(2)(vii)(A)(*1*) of this section, D is deemed to transfer the stock of a foreign corporation to F in a section 354 exchange subject to the rules of paragraphs (b) and (d) of this section, and therefore may enter into a gain recognition agreement for such indirect stock transfer as provided in paragraph (b) of this section and § 1.367(a)–8. * * *

* * * * *

Example 15. Concurrent application of indirect stock transfer rules and section 367(b)—(i) *Facts.* F, a foreign corporation, owns all of the stock of Newco, a domestic corporation. P, a domestic corporation, owns all of the stock of FC, a foreign corporation. P's basis in the stock of FC is $50 and the value of FC stock is $100. The all earnings and profits amount with respect to the FC stock held by P is $60. See § 1.367(b)–2(d). In a reorganization described in sections 368(a)(1)(A) and (a)(2)(D) (and paragraph (d)(1)(i) of this section), Newco acquires all of the properties of FC, and P exchanges its stock in FC for 20 percent of the stock in F.

(ii) *Result.* P's section 354 exchange is considered an indirect stock transfer under paragraph (d)(1)(i) of this section. Further, because the assets of FC were acquired by Newco, a domestic corporation, in an asset reorganization, the transaction is within § 1.367(b)–3(a) and (b). Because the transaction is subject to § 1.367(b)–3 and the indirect stock rules of paragraph (d) of this section, and because the all earnings and profits amount with respect to the FC stock exchanged by P ($60) is greater than the gain in such stock subject to section 367(a) ($50), the section 367(b) rules (and not the section 367(a) rules) apply to the exchange. See § 1.367(a)–3(b)(2)(i)(B). Under the rules of section 367(b), P must include in income the all earnings and profits amount of $60 with respect to its FC stock. See § 1.367(b)–3. Alternatively, if P's all earnings and profits amount with respect to its FC stock were $30 (which is less than the gain in such stock subject to section 367(a) ($50)), section 367(b) and the regulations thereunder would not

apply if there is gain recognition under section 367(a). Thus, if P failed to enter into a 5-year gain recognition agreement in accordance with § 1.367(a)–8, then P would recognize $50 of gain under section 367(a) and there would be no income inclusion under section 367(b). If, instead, P enters into a 5-year gain recognition agreement under § 1.367(a)–8, thereby avoiding immediate gain recognition on the entire $50 of section 367(a) gain, P is required to include in income the all earnings and profits amount of $30. In such a case, P will adjust its basis in the FC stock pursuant to § 1.367(b)–2(e)(3)(ii) and enter into a gain recognition agreement in the amount of $20.

Example 16. Direct asset reorganization not subject to stock transfer rules—(i) *Facts.* D is a domestic corporation that owns all the stock of F1 and F2, both foreign corporations. In a reorganization described in section 368(a)(1)(D), F2 acquires all of the assets of F1, and D receives 30 percent of the stock of F2 in an exchange described in section 354.

(ii) *Result.* The section 368(a)(1)(D) reorganization is not an indirect stock transfer described in paragraph (d) of this section. Moreover, the section 354 exchange by D of F1 stock for F2 stock is not an exchange described under section 367(a). See paragraph (a) of this section.

(e) * * *

(1) *Rules of applicability*—(A) Except as otherwise provided in this paragraph (e), the rules in paragraphs (a), (b), and (d) of this section apply to transfers occurring on or after July 20, 1998.

(B) The following rules apply to transactions occurring on or after January 23, 2006—

(*1*) The rules in paragraphs (a) and (d) of this section, as they apply to section 368(a)(1)(A) reorganizations (including reorganizations described in section 368(a)(2)(D) or (E)) involving a foreign acquiring or foreign acquired corporation;

(*2*) The rules in paragraph (b)(2)(i)(B) of this section;

(*3*) The rules in paragraph (d) of this section, as they apply to section 368(a)(1)(G) reorganizations (including reorganizations described in section 368(a)(2)(D));

(*4*) The rules of paragraph (d)(1) and (d)(2)(iv), as they relate to exchanges by a U.S. person of securities of an acquired corporation for voting stock or securities of a foreign corporation in control of the acquiring corporation in a triangular section 368(a)(1)(B) reorganization;

(*5*) The rules in paragraph (d)(1) and (d)(2)(iv) of this section, as they relate to exchanges by a U.S. person of stock or securities of an acquired corporation for voting stock or securities of a domestic corporation in control of the foreign acquiring corporation in a triangular section 368(a)(1)(B) reorganization; and

(*6*) The rules in paragraph (d)(2)(vii) of this section.

(C) The rules of paragraph (a) of this section that apply to transfers of securities in a section 354 or 356 exchange (pursuant to a section 368(a)(1)(E) reorganization or an asset reorganization that is not treated as an indirect stock transfer) that is not subject to section 367(a) apply only to transfers occurring after January 5, 2005 (although taxpayers may apply such provision to transfers of securities occurring on or after July 20, 1998, and on or before January 5, 2005, if done consistently to all transactions).

(D) The rules in paragraph (d)(1)(v) of this section apply to:

(*1*) A reorganization described in section 368(a)(1)(C) followed by a controlled asset transfer if such reorganization occurs on or after July 20, 1998;

(*2*) A reorganization described in section 368(a)(1)(D) followed by a controlled asset transfer if such reorganization occurs after December 9, 2002 (for additional guidance concerning such reorganizations that occur on or after July 20, 1998 and on or before December 9, 2002, see Rev. Rul. 2002–85 (2002–2 C.B. 986) and § 601.601(d)(2) of this chapter); and

(*3*) A reorganization described in section 368(a)(1)(A), (F), or (G) followed by a controlled asset transfer if such reorganization occurs on or after January 23, 2006.

(E) The rules of paragraph (d)(2)(vi) of this section apply only to transactions occurring on or after January 23, 2006. See § 1.367(a)–3(d)(2)(vi), as contained in 26 CFR part 1 revised as of April 1, 2005, for transactions occurring on or after July 20, 1998 and before January 23, 2006.

(F) With respect to certain transfers of domestic stock or securities, the rules in paragraph (c) of this section are generally applicable for transfers occurring after January 29, 1997. See § 1.367(a)–3(c)(11). For transition rules regarding certain transfers of domestic stock or securities after December 16, 1987, and before January 30, 1997, and transfers of foreign stock or securities after December 16, 1987, and before July 20, 1998, see paragraph (g) of this section.

* * * * *

■ **Par. 4.** Section 1.367(a)–8 is amended as follows:

■ 1. In paragraphs (c)(2) and (d), remove the words ''district director'' and add ''Director of Field Operations'' in their place.

■ 2. In paragraph (e)(1)(i), a sentence is added after the first sentence.

The addition reads as follows:

§ 1.367(a)–8 Gain recognition agreement requirements.

* * * * *

(e) * * *

(1) * * *

(i) * * * It also includes an indirect disposition of the stock of the transferred corporation as described in § 1.367(a)–3(d)(2)(iv). * * *

* * * * *

■ **Par. 5.** In § 1.367(b)–1(a), remove the third and fourth sentences and add a sentence in their place to read as follows:

§ 1.367(b)–1 Other transfers.

(a) * * * For rules coordinating the concurrent application of sections 367(a) and (b), see § 1.367(a)–3(b)(2). * * *

* * * * *

■ **Par. 6.** In § 1.367(b)–3(b)(3)(ii), revise paragraph (i) of *Example 5* to read as follows:

§ 1.367(b)–3 Repatriation of foreign corporate assets in certain nonrecognition transactions.

* * * * *

(b) * * *

(3) * * *

(ii) * * *

Example 5. (i) *Facts.* DC1, a domestic corporation, owns all of the outstanding stock of FC1, a foreign corporation. FC1 owns all of the outstanding stock of FC2, a foreign corporation. The all earnings and profits amount with respect to the FC2 stock owned by FC1 is $20. In a reorganization described in section 368(a)(1)(A), DC2, a domestic corporation unrelated to FC1 or FC2, acquires all of the assets and liabilities of FC2 pursuant to a State W merger. FC2 receives DC2 stock and distributes such stock to FC1. The FC2 stock held by FC1 is canceled, and FC2 ceases its separate legal existence.

* * * * *

■ **Par. 7.** Section 1.367(b)–4 is amended as follows.

■ 1. Paragraph (a) is revised.

■ 2. The heading and first sentence of paragraph (b)(1)(i) are revised.

■ 3. Paragraph (b)(1)(ii) is redesignated as paragraph (b)(1)(iii), and new paragraph (b)(1)(ii) is added.

■ 4. In newly designated paragraph (b)(1)(iii) *Examples 3A* and *3B* are added after *Example 3*.

The revisions and additions read as follows:

§ 1.367(b)–4 Acquisition of foreign corporate stock or assets by a foreign corporation in certain nonrecognition transactions.

(a) *Scope.* This section applies to an acquisition by a foreign corporation (the foreign acquiring corporation) of the

stock or assets of a foreign corporation (the foreign acquired corporation) in an exchange described in section 351 or a reorganization described in section 368(a)(1). In the case of a reorganization described in sections 368(a)(1)(A) and (a)(2)(E), this section applies if stock of the foreign surviving corporation is exchanged for stock of a foreign corporation in control of the merging corporation; in such a case, the foreign surviving corporation is treated as a foreign acquired corporation for purposes of this section. A foreign corporation that undergoes a reorganization described in section 368(a)(1)(E) is treated as both the foreign acquired corporation and the foreign acquiring corporation for purposes of this section. See § 1.367(a)–3(b)(2) for transactions subject to the concurrent application of this section and section 367(a).

(b) * * *

(1) * * *

(i) *General rule.* Except as provided in paragraph (b)(1)(ii) of this section, an exchange is described in this paragraph (b)(1)(i) if—

* * * * *

(ii) *Exception.* In the case of a triangular reorganization described in § 1.358–6(b)(2), or a reorganization described in sections 368(a)(1)(G) and (a)(2)(D), an exchange is not described in paragraph (b)(1)(i) of this section if the stock received in the exchange is stock of a domestic corporation and, immediately after the exchange, such domestic corporation is a section 1248 shareholder of the acquired corporation (in the case of a triangular B reorganization) or the surviving corporation (in the case of a triangular C reorganization, a forward triangular merger, a reorganization described in sections 368(a)(1)(G) and (a)(2)(D), or a reverse triangular merger) and such acquired or surviving corporation is a controlled foreign corporation. See § 1.367(b)–13(c) for rules regarding such domestic corporation's basis in the stock of the surviving corporation. See paragraph (b)(1)(iii) of this section, *Example 3B* for an illustration of this rule.

(iii) * * *

Example 3A. (i) *Facts.* The facts are the same as in *Example 3,* except that FC1 merges into FC2 in a reorganization described in sections 368(a)(1)(A) and (a)(2)(E). Pursuant to the reorganization, DC exchanges its FC2 stock for stock of FP.

(ii) *Result.* The result is similar to the result in *Example 3.* The transfer is an indirect stock transfer subject to section 367(a). See § 1.367(a)–3(d)(1)(ii). Accordingly, DC's exchange of FC2 stock for FP stock will be taxable under section 367(a) (and section 1248 will be applicable) if DC fails to enter into a gain recognition agreement. If DC enters into a gain recognition agreement, the exchange will be subject to the provisions of section 367(b) and the regulations thereunder, as well as section 367(a). If FP and FC2 are controlled foreign corporations as to which DC is a section 1248 shareholder immediately after the reorganization, then paragraph (b)(1)(i) of this section does not apply to require DC to include in income the section 1248 amount attributable to the FC2 stock that was exchanged and the amount of the gain recognition agreement is the amount of gain realized on the indirect stock transfer. If FP or FC2 is not a controlled foreign corporation as to which DC is a section 1248 shareholder immediately after the exchange, then DC must include in income as a deemed dividend from FC2 the section 1248 amount ($20) attributable to the FC2 stock that DC exchanged. Under these circumstances, the gain recognition agreement would be the amount of gain realized on the indirect transfer, less the $20 section 1248 amount inclusion.

Example 3B. (i) *Facts.* The facts are the same as *Example 3,* except that USP, a domestic corporation, owns the controlling interest (within the meaning of section 368(c)) in FC1 stock. In addition, FC2 merges into FC1 in a reorganization described in sections 368(a)(1)(A) and (a)(2)(D). Pursuant to the reorganization, DC exchanges its FC2 stock for USP stock.

(ii) *Result.* Because DC receives stock of a domestic corporation, USP, in the section 354 exchange, the transfer is not an indirect stock transfer subject to section 367(a). Accordingly, the exchange will be subject only to the provisions of section 367(b) and the regulations thereunder. Under paragraph (b)(1)(ii) of this section, because the stock received is stock of a domestic corporation (USP) and, immediately after the exchange, USP is a section 1248 shareholder of FC1 (the surviving corporation) and FC1 is a controlled foreign corporation, the exchange is not described in paragraph (b)(1)(i) of this section and DC is not required to include in income the section 1248 amount attributable to the FC2 stock that was exchanged. See § 1.367(b)–13(c) for the basis and holding period rules applicable to this transaction, which cause USP's adjusted basis and holding period in the stock of FC1 after the transaction to reflect the basis and holding period that DC had in its FC2 stock.

* * * * *

■ **Par. 8.** In § 1.367(b)–6, paragraph (a)(1), add two sentences to the end to read as follows:

§ 1.367(b)–6 Effective dates and coordination rules.

(a) * * *

(1) * * * The rules of §§ 1.367(b)–3 and 1.367(b)–4, as they apply to reorganizations described in section 368(a)(1)(A) (including reorganizations described in section 368(a)(2)(D) or (E)) involving a foreign acquiring or foreign acquired corporation, apply only to transfers occurring on or after January 23, 2006. Section 1.367(b)–4(b)(1)(ii) applies to triangular B reorganizations occurring on or after February 23, 2000 and to all other triangular reorganizations and reorganizations described in section 368(a)(1)(G) and (a)(2)(D) occurring on or after January 23, 2006.

* * * * *

■ **Par. 9.** Section 1.367(b)–13 is added to read as follows:

§ 1.367(b)–13 Special rules for determining basis and holding period.

(a) *Scope and definitions*—(1) *Scope.* This section provides special basis and holding period rules to determine the basis and holding period of stock of certain foreign surviving corporations held by a controlling corporation whose stock is issued in an exchange under section 354 or 356 in a triangular reorganization. This section applies to transactions that are subject to section 367(b) as well as section 367(a), including transactions concurrently subject to sections 367(a) and (b).

(2) *Definitions.* For purposes of this section, the following definitions apply:

(i) A block of stock has the meaning provided in § 1.1248–2(b).

(ii) A triangular reorganization is a reorganization described in § 1.358–6(b)(2)(i), (ii), or (iii) or in sections 368(a)(1)(G) and (a)(2)(D) (a forward triangular merger, triangular C reorganization, reverse triangular merger, or triangular G reorganization, respectively). For purposes of triangular reorganizations—

(A) P is a corporation that is a party to a reorganization that is in control (within the meaning of section 368(c)) of another party to the reorganization and whose stock is transferred pursuant to the reorganization;

(B) S is a corporation that is a party to the reorganization and that is controlled by P; and

(C) T is a corporation that is another party to the reorganization.

(b) *Determination of basis for exchanges of foreign stock or securities under section 354 or 356.* For rules determining the basis of stock or securities in a foreign corporation received in a section 354 or 356 exchange, see § 1.358–2.

(c) *Determination of basis and holding period for triangular reorganizations*—(1) *Application.* In the case of a triangular reorganization described in paragraph (a)(2)(ii) of this section, this paragraph (c) applies, if—

(i)(A) Immediately before the transaction, either P is a section 1248 shareholder with respect to S, or P is a foreign corporation and a United States

person is a section 1248 shareholder with respect to both P and S; and

(B) In the case of a reverse triangular merger, P's exchange of S stock is not described in § 1.367(b)–3(a) and (b) or in § 1.367(b)–4(b)(1)(i), (2)(i), or (3); or

(ii)(A) Immediately before the transaction, a shareholder of T is a section 1248 shareholder with respect to T, or a shareholder of T is a foreign corporation and a United States person is a section 1248 shareholder with respect to both such foreign corporation and T; and

(B) With respect to at least one of the exchanging shareholders described in paragraph (c)(1)(ii)(A) of this section, the exchange of T stock is not described in § 1.367(b)–3(a) and (b) or in § 1.367(b)–4(b)(1)(i), (2)(i), or (3).

(2) *Basis and holding period rules.* In the case of a triangular reorganization described in paragraph (c)(1) of this section, each share of stock of the surviving corporation (S or T) held by P must be divided into portions attributable to the S stock and the T stock immediately before the exchange. See paragraph (e) of this section *Examples 1* through *4* for illustrations of this rule.

(i) *Portions attributable to S stock*—(A) In the case of a forward triangular merger, a triangular C reorganization, or a triangular G reorganization, the basis and holding period of the portion of each share of surviving corporation stock attributable to the S stock is the basis and holding period of such share of stock immediately before the exchange.

(B) In the case of a reverse triangular merger, the basis and holding period of the portion of each share of surviving corporation stock attributable to the S stock is the basis and the holding period immediately before the exchange of a proportionate amount of the S stock to which the portion relates. If P is a shareholder described in paragraph (c)(1)(i)(A) of this section with respect to S, and P exchanges two or more blocks of S stock pursuant to the transaction, then each share of the surviving corporation (T) attributable to the S stock must be further divided into separate portions to account for the separate blocks of stock in S.

(C) If the value of S stock immediately before the triangular reorganization is less than one percent of the value of the surviving corporation stock immediately after the triangular reorganization, then P may determine its basis in the surviving corporation stock by applying the rules of paragraph (c)(2)(ii) of this section to determine the basis and holding period of the surviving corporation stock attributable to the T stock, and then increasing the basis of each share of surviving corporation stock by the proportionate amount of P's aggregate basis in the S stock immediately before the exchange (without dividing the stock of the surviving corporation into separate portions attributable to the S stock).

(ii) *Portions attributable to T stock*—(A) If any exchanging shareholder of T stock is described in paragraph (c)(1)(ii) of this section, the basis and holding period of the portion of each share of stock in the surviving corporation attributable to the T stock is the basis and holding period immediately before the exchange of a proportionate amount of the T stock to which such portion relates. If any exchanging shareholder of T stock is described in paragraph (c)(1)(ii) of this section, and such shareholder exchanges two or more blocks of T stock pursuant to the transaction, then each share of surviving corporation stock attributable to the T stock must be further divided into separate portions to account for the separate blocks of T stock.

(B) If no exchanging shareholder of T stock is described in paragraph (c)(1)(ii) of this section, the rules of § 1.358–6 apply to determine the basis of the portion of each share of the surviving corporation attributable to T immediately before the exchange.

(d) *Special rules applicable to divided shares of stock*—(1) *In general*—(i) Shares of stock in different blocks are aggregated into one divided portion for basis purposes, if such shares immediately before the exchange are owned by one or more shareholders that are—

(A) Not section 1248 shareholders with respect to the corporation; or

(B) Foreign corporate shareholders, provided that no United States persons are section 1248 shareholders with respect to both such foreign corporate shareholders and the corporation.

(ii) For purposes of determining the amount of gain realized on the sale or exchange of stock that has a divided portion pursuant to paragraph (c) of this section, any amount realized on such sale or exchange will be allocated to each divided portion of the stock based on the relative fair market value of the stock to which the portion is attributable at the time the portions were created. See paragraph (e) *Example 5* of this section.

(iii) Shares of stock will no longer be required to be divided if section 1248 or section 964(e) would not apply to a disposition or exchange of such stock.

(2) *Pre-exchange earnings and profits.* All earnings and profits (or deficits) accumulated by a foreign corporation before the reorganization and attributable to a share (or block) of stock for purposes of section 1248 are attributable to the divided portion of stock with the basis and holding period of that share (or block). See § 1.367(b)–4(d).

(3) *Post-exchange earnings and profits.* Any earnings and profits (or deficits) accumulated by the surviving corporation subsequent to the reorganization are attributed to each divided share of stock pursuant to section 1248 and the regulations thereunder. The amount of earnings and profits (or deficits) attributable to a divided share of stock is further attributed to the divided portions of such share of stock based on the relative fair market value of each divided portion of stock. See paragraph (e) *Example 5* of this section.

(e) *Examples.* The rules of this section are illustrated by the following examples:

Example 1. Blocks of stock exchanged in a triangular reorganization—(i) *Facts.* (A) US1, a domestic corporation, owns all the stock of F1, a foreign corporation. F1 owns all the stock of FT, a foreign corporation, with 100 shares of stock outstanding. Each share of FT stock is valued at $10x. Because F1 acquired the stock of FT at two different dates, F1 owns two blocks of FT stock for purposes of section 1248. The first block consists of 60 shares. The shares in the first block have a basis of $300x ($5x per share), a holding period of 10 years, and $240x ($4x per share) of earnings and profits attributable to the shares for purposes of section 1248. The second block consists of 40 shares. The shares in the second block have a basis of $600x ($15x per share), a holding period of 2 years, and $80x ($2x per share) of earnings and profits attributable to the shares for purposes of section 1248.

(B) US2, a domestic corporation, owns all of the stock of FP, a foreign corporation, which owns all of the stock of FS, a foreign corporation. FP owns two blocks of FS stock. Each block consists of 10 shares with a value of $200x ($20x per share). The shares in the first block have a basis of $50x ($5x per share), a holding period of 10 years, and $50x ($5x per share) of earnings and profits attributable to such shares for purposes of section 1248. The shares in the second block had a basis of $100x ($10x per share), a holding period of 5 years, and $20x ($2x per share) of earnings and profits attributable to such shares for purposes of section 1248.

(C) FT merges into FS, with FS surviving, and F1 receives 50 shares of FP stock with a value of $1,000x in exchange for its FT stock. The merger of FT into FS qualifies as forward triangular merger, and immediately after the exchange US1 is a section 1248 shareholder with respect to F1, the exchanging shareholder, FP and FS, all of which are controlled foreign corporations.

(ii) *Basis and holding period determination.* (*1*) US1 is a section 1248 shareholder of F1, the exchanging

shareholder, and FT (both of which are controlled foreign corporations) immediately before the transaction. Moreover, F1 is not required to include amounts in income under § 1.367(b)–3(b) or 1.367(b)–4(b) as described in paragraph (c)(1)(ii)(B) of this section. Accordingly, the basis and holding period of the FS stock held by FP immediately after the triangular reorganization is determined pursuant to paragraph (c) of this section.

(*2*) Pursuant to paragraph (c) of this section, each share of FS stock is divided into portions attributable to the basis and holding period of the FS stock held by FP immediately before the exchange (the FS portion) and the FT stock held by F1 immediately before the exchange (the FT portion). The basis and holding period of the FS portion is the basis and holding period of the FS stock held by FP immediately before the exchange. Thus, each share of FS stock in the first block has a portion with a basis of $5x, a value of $20x, a holding period of 10 years, and $5x of earnings and profits attributable to such portion for purposes of section 1248. Each share of FS stock in the second block has a portion with a basis of $10x, a value of $20x, a holding period of 5 years, and $2x of earnings and profits attributable to such portion for purposes of section 1248.

(*3*) Because the exchanging shareholder of FT stock (F1) has a section 1248 shareholder (US1), the holding period and basis of the FT portion is the holding period and the proportionate amount of the basis of the FT stock immediately before the exchange to which such portion relates. Further, because F1 exchanged two blocks of FT stock, the FT portion must be divided into two separate portions attributable to the two blocks of FT stock. Thus, each share of FS stock will have a second portion with a basis of $15x ($300x basis / 20 shares), a value of $30x ($600x value / 20 shares), a holding period of 10 years, and $12x of earnings and profits ($240x / 20 shares) attributable to such portion for purposes of section 1248. Each share of FS stock will have a third portion with a basis of $30x ($600x basis / 20 shares), a value of $20x ($400x value / 20 shares), a holding period of 2 years, and $4x of earnings and profits ($80x / 20 shares) attributable to such portion for purposes of section 1248.

(iii) *Subsequent disposition—first block.* Assume, immediately after the transaction, FP disposes of a share of FS stock from the first block. When FP disposes of any share of its FS stock, it is treated as disposing of each divided portion of such share. With respect to the first portion (attributable to the FS stock), FP recognizes a gain of $15x ($20x value − $5x basis), $5x of which is treated as a dividend under section 1248. With respect to the second portion (attributable to the first block of FT stock), FP recognizes a gain of $15x ($30x value − $15x basis), $12x of which is treated as a dividend under section 1248. With respect to the third portion (attributable to the second block of FT stock), FP recognizes a capital loss of $10x ($20x value − $30x basis).

(iv) *Subsequent disposition—second block.* Assume further, immediately after the transaction, FP also disposes of a share of stock from the second block of FS stock. With respect to the first portion (attributable to the FS stock), FP recognizes a gain of $10x ($20x value − $10x basis), $2x of which is treated as a dividend under section 1248. With respect to the second portion (attributable to the first block of FT stock), FP recognizes a gain of $15x ($30x value − $15x basis), $12x of which is treated as a dividend under section 1248. With respect to the third portion (attributable to the second block of FT stock), FP recognizes a capital loss of $10x ($20x value − $30x basis).

Example 2. (i) *Facts.* The facts are the same as in *Example 1,* except that FS merges into FT with FT surviving in a reverse triangular merger. Pursuant to the merger, F1 receives FP stock with a value of $1,000x in exchange for its FT stock, and FP receives 10 shares of FT stock with a value of $1,000x in exchange for its FS stock. Immediately after the exchange, US1 is a section 1248 shareholder with respect to F1, the exchanging shareholder, FP, and FT, all of which are controlled foreign corporations.

(ii) *Basis and holding period determination*—(A) The basis and holding period of the stock of the surviving corporation held by FP are the same as in *Example 1,* except that each share of the surviving corporation (FT, instead of FS) will be divided into four portions instead of three portions. Because FP exchanges two blocks of FS stock, the FS portion must be divided into two separate portions attributable to the two blocks of FS stock. Because F1 exchanges two blocks of FT stock, the FT portion must be divided into two separate portions attributable to the two blocks of FT stock.

(B) Thus, each share of the surviving corporation (FT) will have a first portion (attributable to the first block of FS stock) with a basis of $5x ($50x / 10 shares), a value of $20x ($200x / 10 shares), a holding period of 10 years, and $5x of earnings and profits ($50x / 10 shares) attributable to such portion for purposes of section 1248. Each share of FT stock will have a second portion (attributable to the second block of FS stock) with a basis of $10x ($100x / 10 shares), a value of $20x ($200x / 10 shares), a holding period of 5 years, and $2x of earnings and profits ($20x / 10 shares) attributable to such portion for purposes of section 1248. Moreover, each share of FT stock will have a third portion (attributable to the first block of FT stock) with a basis of $30x ($300x basis / 10 shares), a value of $60x ($600x value / 10 shares), a holding period of 10 years, and $24x of earnings and profits ($240x / 10 shares) attributable to such portion for purposes of section 1248. Lastly, each share of FT stock will have a fourth portion (attributable to the second block of FT stock) with a basis of $60x ($600x basis / 10 shares), a value of $40x ($400x value / 10 shares), a holding period of 2 years, and $8x of earnings and profits ($80x / 10 shares) attributable to such portion for purposes of section 1248.

Example 3. (i) *Facts.* USP, a domestic corporation, owns all the stock of FS, a foreign corporation with 10 shares of stock outstanding. Each share of FS stock has a value of $10x, a basis of $5x, a holding period of 10 years, and $7x of earnings and profits attributable to such share for purposes of section 1248. FP, a foreign corporation, owns the stock of FT, another foreign corporation. FP and FT do not have any section 1248 shareholders. FT has assets with a value of $100x, a basis of $50x, and no liabilities. The FT stock held by FP has a value of $100x and a basis of $75x. FT merges into FS with FS surviving in a forward triangular merger. Pursuant to the reorganization, FP receives USP stock with a value of $100x in exchange for its FT stock.

(ii) *Basis and holding period determination*—(A) Because USP is a section 1248 shareholder of FS immediately before the transaction, the basis and holding period of the FS stock held by USP immediately after the triangular reorganization is determined pursuant to paragraph (c) of this section.

(B) Pursuant to paragraph (c) of this section, each share of FS stock is divided into portions attributable to the basis and holding period of the FS stock held by USP immediately before the exchange (the FS portion) and the FT portion immediately before the exchange. Because FT does not have a section 1248 shareholder immediately before the transaction, the rules of § 1.358–6 apply to determine the basis of the FT portion of each share of FS stock. Those rules determine the basis of FS stock held by USP by reference to the basis of FT's net assets. The basis and holding period of the FS portion is the basis and holding period of the FS stock held by USP immediately before the exchange. Thus, each share of FS stock has a portion with a basis of $5x, a value of $10x, a holding period of 10 years, and $7x of earnings and profits attributable to such portion for section 1248 purposes. The basis of the FT portion is the basis of the FT assets to which such portion relates. Thus, each share of FS stock has a second portion with a basis of $5x ($50x basis in FT's assets / 10 shares) and a value of $10x ($100x value of FT's assets / 10 shares). All of FS's earnings and profits prior to the transaction ($70x) is attributed solely to the FS portion in each share of FS stock. As a result of each share of stock being divided into portions, the basis of the FS stock is not averaged with the basis of the FT assets to increase the section 1248 amount with respect to the stock of the surviving corporation (FS).

Example 4. (i) *Facts.* US, a domestic corporation, owns all of the stock of FT, a foreign corporation. The FT stock held by US constitutes a single block of stock with a value of $1,000x, a basis of $600x, and holding period of 5 years. USP, a domestic corporation, forms FS, a foreign corporation, pursuant to the plan of reorganization and capitalizes it with $10x of cash. FS merges into FT with FT surviving in a reverse triangular merger and a reorganization described in section 368(a)(1)(B). Pursuant to the reorganization, US receives USP stock with a value of $1,000x in exchange for its FT stock, and USP receives 10 shares of FT stock with a value of $1,010x in exchange for its FS stock.

(ii) *Basis and holding period determination.* (A) US and USP are section 1248 shareholders of FT and FS, respectively, immediately before the transaction. Neither

US nor USP is required to include amounts in income under § 1.367(b)–3(b) or 1.367(b)–4(b) as described in paragraph (c)(1)(i)(B) or (c)(1)(ii)(B) of this section. The basis and holding period of the FT stock held by USP is determined pursuant to paragraph (c) of this section.

(B) Pursuant to paragraph (c) of this section, because the exchanging shareholder of FT stock (US) is a section 1248 shareholder of FT, each share of the surviving corporation (FT) has a proportionate amount of the basis and holding period of the FT stock immediately before the exchange to which such share relates. Thus, the portion of each share of FT stock attributable to the FT stock has a basis of $60x ($600x basis / 10 shares), a value of $100x ($1,000x value / 10 shares), and a holding period of 5 years. Because the value of FS stock immediately before the triangular reorganization ($10x) is less than one percent of the value of the surviving corporation (FT) immediately after the triangular reorganization ($1,010x), USP may determine its basis in the stock of the surviving corporation (FT) attributable to its FS stock basis held prior to the reorganization by increasing the basis of each share of FT stock by the proportionate amount of USP's aggregate basis in the FS stock immediately before the exchange (without dividing each share of FT stock into separate portions to account for FS and FT). If USP so elects, USP's basis in each share of FT stock is increased by $1x ($10x basis in FS stock / 10 shares). As a result, each share of FT stock has a basis of $61x, a value of $101x, and a holding period of 5 years.

Example 5. (i) *Facts.* US, a domestic corporation, owns all of the stock of F1, a foreign corporation, which owns all the stock of FT, a foreign corporation. The FT stock held by F1 constitutes one block of stock with a basis of $170x, a value of $200x, a holding period of 5 years, and $10x of earnings and profits attributable to such stock for purposes of section 1248. FP, a foreign corporation, owns all the stock of FS, a foreign corporation. FS has 10 shares of stock outstanding. No United States person is a section 1248 shareholder with respect to FP or FS. The FS stock held by FP has a value of $100x and a basis of $50x ($5x per share). FT merges into FS with FS surviving in a forward triangular merger. Pursuant to the merger, F1 receives FP stock with a value of $200x for its FT stock in an exchange that qualifies for non-recognition under section 354. US is a section 1248 shareholder with respect to F1, the exchanging shareholder, FP, and FS (all of which are controlled foreign corporations) immediately after the exchange.

(ii) *Basis and holding period determination.* (A) Because US is a section 1248 shareholder of F1, the exchanging shareholder, and FT immediately before the transaction, and US is a section 1248 shareholder of F1, FP, and FS immediately after the transactions, F1 is not required to include amounts in income under §§ 1.367(b)–3(b) and 1.367(b)–4(b) as described in paragraph (c)(1)(ii)(B) of this section. Thus, the basis and holding period of the FS stock held by FP immediately after the triangular reorganization is determined pursuant to paragraph (c) of this section.

(B) Pursuant to paragraph (c) of this section, each share of FS stock is divided into portions attributable to the basis and holding period of the FS stock held by FP immediately before the exchange (the FS portion) and the FT stock held by F1 immediately before the exchange (the FT portion). The basis and holding period of the FS portion is the basis and holding period of the FS stock held by FP immediately before the exchange. Thus, each share of FS stock has a portion with a basis of $5x and a value of $10x. Because the exchanging shareholder of FT stock (F1) has a section 1248 shareholder of both F1 and FT, the basis and holding period of the FT portion is the proportionate amount of the basis and the holding period of the FT stock immediately before the exchange to which such portion relates. Thus, each share of FS stock will have a second portion with a basis of $17x ($170x basis / 10 shares), a value of $20x ($200x value / 10 shares), a holding period of 5 years, and $1x of earnings and profits ($10x earnings and profits / 10 shares) attributable to such portion for purposes of section 1248.

(iii) *Subsequent disposition.* (A) Several years after the merger, FP disposes of all of its FS stock in a transaction governed by section 964(e). At the time of the disposition, FS stock has decreased in value to $210x (a post-merger reduction in value of $90x), and FS has incurred a post-merger deficit in earnings and profits of $30x.

(B) Pursuant to paragraph (d)(1)(ii) of this section, for purposes of determining the amount of gain realized on the sale or exchange of stock that has a divided portion, any amount realized on such sale or exchange is allocated to each divided portion of the stock based on the relative fair market value of the stock to which the portion is attributable at the time the portions were created. Immediately before the merger, the value of the FS stock in relation to the value of both the FS stock and the FT stock was one-third ($100x / ($100x plus $200x)). Likewise, immediately before the merger, the value of the FT stock in relation to the value of both the FT stock and the FS stock was two-thirds ($200x / $100x plus $200x). Accordingly, one-third of the $210x amount realized is allocated to the FS portion of each share and two-thirds to the FT portion of each share. Thus, the amount realized allocated to the FS portion of each share is $7x (one-third of $210x divided by 10 shares). The amount realized allocated to the FT portion of each share is $14x (two-thirds of $210x divided by 10 shares).

(C) Pursuant to paragraph (d)(3) of this section, any earnings and profits (or deficits) accumulated by the surviving corporation subsequent to the reorganization are attributed to the divided portions of shares of stock based on the relative fair market value of each divided portion of stock. Accordingly, one-third of the post-merger earnings and profits deficit of $30x is allocated to the FS portion of each share and two-thirds to the FT portion of each share. Thus, the deficit in earnings and profits allocated to the FS portion of each share is $1x (one-third of $30x divided by 10 shares). The deficit in earnings and profits allocated to the FT portion of each share is $2x (two-thirds of $30x divided by 10 shares).

(D) When FP disposes of its FS stock, FP is treated as disposing of each divided portion of a share of stock. With respect to the FS portion of each share of stock, FP recognizes a gain of $2x ($7x value − $5x basis), which is not recharacterized as a dividend because a deficit in earnings and profits of $1x is attributable to such portion for purposes of section 1248. With respect to the FT portion of each share of stock, FP recognizes a loss of $3x ($14x value − $17x basis).

(f) *Effective date.* This section applies to exchanges occurring on or after January 23, 2006.

■ **Par. 10.** Section 1.884–2 is amended as follows:

■ 1. Paragraphs (c)(3) through (c)(6)(i)(A) are revised.

■ 2. Paragraphs (c)(6)(i)(B), (C), and (D) are added.

■ 3. Paragraphs (c)(6)(ii) through (f) are revised.

■ 4. Paragraph (g) is amended by adding a sentence at the end.

The revisions and additions read as follows:

§ 1.884–2 Special rules for termination or incorporation of a U.S. trade or business or liquidation or reorganization of a foreign corporation or its domestic subsidiary.

* * * * *

(c)(3) through (c)(6)(i)(A) [Reserved]. For further guidance, see § 1.884–2T(c)(3) through (c)(6)(i)(A).

(B) Shareholders of the transferee (or of the transferee's parent in the case of a triangular reorganization described in section 368(a)(1)(C) or a reorganization described in sections 368(a)(1)(A) and 368(a)(2)(D) or (E)) who in the aggregate owned more than 25 percent of the value of the stock of the transferor at any time within the 12-month period preceding the close of the year in which the section 381(a) transaction occurs sell, exchange or otherwise dispose of their stock or securities in the transferee at any time during a period of three years from the close of the taxable year in which the section 381(a) transaction occurs.

(C) In the case of a triangular reorganization described in section 368(a)(1)(C) or a reorganization described in sections 368(a)(1)(A) and 368(a)(2)(D) or (E), the transferee's parent sells, exchanges, or otherwise disposes of its stock or securities in the transferee at any time during a period of three years from the close of the taxable year in which the section 381(a) transaction occurs.

(D) A corporation related to any such shareholder or the shareholder itself if it is a corporation (subsequent to an

event described in paragraph (c)(6)(i)(A) or (B) of this section) or the transferee's parent (subsequent to an event described in paragraph (c)(6)(i)(C) of this section), uses, directly or indirectly, the proceeds or property received in such sale, exchange or disposition, or property attributable thereto, in the conduct of a trade or business in the United States at any time during a period of three years from the date of sale in the case of a disposition of stock in the transferor, or from the close of the taxable year in which the section 381(a) transaction occurs in the case of a disposition of the stock or securities in the transferee (or the transferee's parent in the case of a triangular reorganization described in section 368(a)(1)(C) or a reorganization described in sections 368(a)(1)(A) and (a)(2)(D) or (E)). Where this paragraph (c)(6)(i) applies, the transferor's branch profits tax liability for the taxable year in which the section 381(a) transaction occurs shall be determined under § 1.884–1, taking into account all the adjustments in U.S. net equity that result from the transfer of U.S. assets and liabilities to the transferee pursuant to the section 381(a) transaction, without regard to any provisions in this paragraph (c). If an event described in paragraph (c)(6)(i)(A), (B), or (C) of this section occurs after the close of the taxable year in which the section 381(a) transaction occurs, and if additional branch profits tax is required to be paid by reason of the application of this paragraph (c)(6)(i), then interest must be paid on that amount at the underpayment rates determined under section 6621(a)(2), with respect to the period between the date that was prescribed for filing the transferor's income tax return for the year in which the section 381(a) transaction occurs and the date on which the additional tax for that year is paid. Any such additional tax liability together with interest thereon shall be the liability of the transferee within the meaning of section 6901 pursuant to section 6901 and the regulations thereunder.

(c)(6)(ii) through (f) [Reserved]. For further guidance, see § 1.884–2T(c)(6)(ii) through (f).

(g) * * * Paragraphs (c)(6)(i)(B), (C), and (D), are applicable for tax years beginning after December 31, 1986, except that such paragraphs are applicable to transactions occurring on or after January 23, 2006, in the case of reorganizations described in sections 368(a)(1)(A) and 368(a)(2)(D) or (E).

■ **Par. 11.** In § 1.884–2T, paragraphs (c)(6)(i)(B), (C), and (D) are revised to read as follows:

§ 1.884–2T Special rules for termination or incorporation of a U.S. trade or business or liquidation or reorganization of a foreign corporation or its domestic subsidiary (Temporary).

* * * * *

(c) * * *

(6) * * *

(i) * * *

(B), (C), and (D) [Reserved]. For further guidance, see § 1.884–2(c)(6)(i)(B), (C), and (D).

■ **Par. 12.** Section § 1.6038B–1 is amended as follows:

■ 1. Paragraphs (b)(1)(i) and (b)(1)(ii) are revised.

■ 2. The text of paragraph (g) is redesignated as paragraph (g)(1) and the first sentence is revised.

■ 3. Paragraphs (g)(2), (g)(3), and (g)(4) are added.

The revisions and addition are as follows:

§ 1.6038B–1 Reporting of certain transfers to foreign corporations.

* * * * *

(b) *Time and manner of reporting*—(1) *In general*—(i) *Reporting procedure.* Except for stock or securities qualifying under the special reporting rule of § 1.6038B–1(b)(2), and certain exchanges described in section 354 or 356 (listed below), any U.S. person that makes a transfer described in section 6038B(a)(1)(A), 367(d) or (e), is required to report pursuant to section 6038B and the rules of § 1.6038B–1 and must attach the required information to Form 926, ''Return by a U.S. Transferor of Property to a Foreign Corporation.'' For special rules regarding cash transfers made in tax years beginning after February 5, 1999, see paragraphs (b)(3) and (g) of this section. For purposes of determining a U.S. transferor that is subject to section 6038B, the rules of §§ 1.367(a)–1T(c) and 1.367(a)–3(d) shall apply with respect to a transfer described in section 367(a), and the rules of § 1.367(a)–1T(c) shall apply with respect to a transfer described in section 367(d). Additionally, if in an exchange described in section 354 or 356, a U.S. person exchanges stock or securities of a foreign corporation in a reorganization described in section 368(a)(1)(E), or a U.S. person exchanges stock or securities of a domestic or foreign corporation pursuant to an asset reorganization described in section 368(a)(1) (involving a transfer of assets under section 361) that is not treated as an indirect stock transfer under § 1.367(a)–3(d), then the U.S. person exchanging stock or securities is not required to report under section 6038B. Notwithstanding any statement to the contrary on Form 926, the form and attachments must be attached to, and filed by the due date (including extensions) of the transferor's income tax return for the taxable year that includes the date of the transfer (as defined in § 1.6038B–1T(b)(4)). For taxable years beginning before January 1, 2003, any attachment to Form 926 required under the rules of this section is filed subject to the transferor's declaration under penalties of perjury on Form 926 that the information submitted is true, correct and complete to the best of the transferor's knowledge and belief. For taxable years beginning after December 31, 2002, Form 926 and any attachments shall be verified by signing the income tax return with which the form and attachments are filed.

(ii) [Reserved]. For further guidance, see § 1.6038B–1T(b)(ii).

* * * * *

(g) *Effective dates*—(1) This section applies to transfers occurring on or after July 20, 1998, except for transfers of cash made in tax years beginning on or before February 5, 1999 (which are not required to be reported under section 6038B), except for transfers described in paragraphs (g)(2) through (4) of this section, and except for transfers described in paragraph (e) of this section, which applies to transfers that are subject to §§ 1.367(e)–1(f) and 1.367(e)–2(e). * * *

(2) The rules of paragraph (b)(1)(i) of this section as they apply to section 368(a)(1)(A) reorganizations (including reorganizations described in section 368(a)(2)(D) or (E)) apply to transfers occurring on or after January 23, 2006.

(3) The rules of paragraph (b)(1)(i) of this section that provide an exception from reporting under section 6038B for transfers of stock or securities in a section 354 or 356 exchange, pursuant to a section 368(a)(1)(G) reorganization that is not treated as an indirect stock transfer under § 1.367(a)–3(d), apply to transfers occurring on or after January 23, 2006.

(4) The rules of paragraph (b)(1)(i) of this section that provide an exception from reporting under section 6038B for transfers of stock in a section 354 or 356 exchange, pursuant to a section 368(a)(1)(E) reorganization or an asset reorganization under section 368(a)(1) that is not treated as an indirect stock transfer under § 1.367(a)–3(d), apply to transfers occurring on or after January 23, 2006. The rules of paragraph (b)(1)(i) of this section that provide an exception from reporting under section 6038B for transfers of securities in a section 354 or 356 exchange, pursuant to a section 368(a)(1)(E) reorganization or an asset

reorganization under section 368(a)(1) that is not treated as an indirect stock transfer under § 1.367(a)–3(d), apply only to transfers occurring after January 5, 2005 (although taxpayers may apply such provision to transfers of securities occurring on or after July 20, 1998 and on or before January 5, 2005 if done consistently to all transactions). See § 1.6038–1T(b)(i), as contained in 26 CFR part 1 revised as of April 1, 2005, for transfers occurring prior to the effective dates described in paragraphs (g)(2) through (4) of this section.

■ **Par. 13.** In § 1.6038B–1T, paragraph (b)(1)(i) is revised to read as follows:

§ 1.6038B–1T Reporting of certain transactions to foreign corporations (temporary).

* * * * *

(b) *Time and manner of reporting*—(1) *In general*—(i) [Reserved]. For further guidance, see § 1.6038B–1(b)(1)(i).

* * * * *

Mark E. Matthews,

Deputy Commissioner for Services and Enforcement.

Approved: January 17, 2006.

Eric Solomon,

Acting Deputy Assistant Secretary of the Treasury (Tax Policy).

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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 20

RIN 1018–AU04; 1018–AU09; 1018–AU13; 1018–AU28

Migratory Bird Hunting; Approval of Tungsten-Iron-Copper-Nickel, Iron-Tungsten-Nickel Alloy, Tungsten-Bronze (Additional Formulation), and Tungsten-Tin-Iron Shot Types as Nontoxic for Hunting Waterfowl and Coots; Availability of Environmental Assessments

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule; availability of Final Environmental Assessment and Finding of No Significant Impact.

SUMMARY: The U.S. Fish and Wildlife Service (we, us, or USFWS) approves four shot types or alloys for hunting waterfowl and coots and changes the listing of approved nontoxic shot types to reflect the cumulative approvals of nontoxic shot types and alloys. In addition, we approve alloys of several metals because we have approved the metals individually at or near 100% in nontoxic shot. We have prepared a Final Environmental Assessment and a Finding of No Significant Impact in support of this decision.

DATES: This rule takes effect on February 27, 2006.

ADDRESSES: The Final Environmental Assessments for the shot types and the associated Findings of No Significant Impact are available from the Division of Migratory Bird Management, U.S. Fish and Wildlife Service, 4501 North Fairfax Drive, Room 4091, Arlington, Virginia 22203–1610. You may call 703–358–1825 to request copies.

The complete file for this rule is available, by appointment, during normal business hours at the same address. You may call 703–358–1825 to make an appointment to view the files.

FOR FURTHER INFORMATION CONTACT: Dr. George T. Allen, Division of Migratory Bird Management, 703–358–1714.

SUPPLEMENTARY INFORMATION:

Background

The Migratory Bird Treaty Act of 1918 (Act) (16 U.S.C. 703–711) and the Fish and Wildlife Improvement Act of 1978 (16 U.S.C. 712) implement migratory bird treaties between the United States and Great Britain for Canada (1916, amended), Mexico (1936, amended), Japan (1972, amended), and Russia (then the Soviet Union, 1978). These treaties protect certain migratory birds from take, except as permitted under the Acts. The Acts authorize the Secretary of the Interior to regulate take of migratory birds in the United States. Under this authority, the U.S. Fish and Wildlife Service controls the hunting of migratory game birds through regulations in 50 CFR part 20.

Deposition of toxic shot and release of toxic shot components in waterfowl hunting locations are potentially harmful to many organisms. Research has shown that ingested spent lead shot causes significant mortality in migratory birds. Since the mid-1970s, we have sought to identify shot types that do not pose significant toxicity hazards to migratory birds or other wildlife. We addressed the issue of lead poisoning in waterfowl in an Environmental Impact Statement in 1976, and again in a 1986 supplemental EIS. The 1986 document provided the scientific justification for a ban on the use of lead shot and the subsequent approval of steel shot for hunting waterfowl and coots that began that year, with a complete ban of lead for waterfowl and coot hunting in 1991. We have continued to consider other potential candidates for approval as nontoxic shot. We are obligated to review applications for approval of alternative shot types as nontoxic for hunting waterfowl and coots.

We received applications for approval of four shot types as nontoxic for hunting waterfowl and coots. Those shot types are:

1. Tungsten-Iron-Copper-Nickel (TICN) shot, of 40–76 percent tungsten, 10–37 percent iron, 9–16 percent copper, and 5–7 percent nickel (70 FR 3180, January 21, 2005);

2. Iron-Tungsten-Nickel (ITN) alloys composed of 20–70 percent tungsten, 10–40 percent nickel, and 10–70 percent iron (70 FR 22625, May 2, 2005);

3. Tungsten-Bronze (TB) shot made of 60 percent tungsten, 35.1 percent copper, 3.9 percent tin, and 1 percent iron (70 FR 22624, May 2, 2005, Note: This formulation differs from the Tungsten-Bronze nontoxic shot formulation approved in 2004.); and

4. Tungsten-Tin-Iron (TTI) shot composed of 58 percent tungsten, 38 percent tin, and 4 percent iron (70 FR 32282, June 2, 2005).

We reviewed the shot under the criteria in Tier 1 of the nontoxic shot approval procedures contained in 50 CFR 20.134 for permanent approval of shot as nontoxic for hunting waterfowl and coots. We amend 50 CFR 20.21(j) to add the shot types to the list of those approved for waterfowl and coot hunting.

On August 24, 2005, we published a proposed rule to approve the four shot types as nontoxic (70 FR 49541). The applications for the approval of the shot types included information on chemical characterization, production variability, use, expected production volume, toxicological effects, environmental fate and transport, and evaluation, and the proposed rule included this information, a comprehensive evaluation of the likely effects of each shot, and an assessment of the affected environment.

The Director of the U.S. Fish and Wildlife Service has concluded that the spent shot material will not pose a significant danger to migratory birds or other wildlife or their habitats, and therefore approves the use of the four shot types as nontoxic for hunting waterfowl and coots.

We received one comment in response to the proposed rule. However, the commenter raised no issues that caused us to reconsider our approval of the shot types as nontoxic.

The metals in these shot types have already been approved in other nontoxic shot types. In considering approval of these shot types, we were particularly concerned about the solubility and bioavailability of the nickel and copper

in them. In addition, because tungsten, tin, and iron have already been approved at very high proportions of other nontoxic shot types with no known negative effects of the metals, we approve all alloys of these four metals.

The data provided to us indicate that the shot types are nontoxic when ingested by waterfowl and should not pose a significant danger to migratory birds, other wildlife, or their habitats. We conclude that they raise no particular concerns about deposition in the environment or about ingestion by waterfowl or predators.

The process for submission and evaluation of new shot types for approval as nontoxic is given at 50 CFR 20.134. The list of shot types approved as nontoxic for use in hunting migratory birds is provided in the table at 50 CFR 20.21(j). With this rule, we also propose to revise the listing of approved nontoxic shot types in § 20.21(j) to include the cumulative approvals of the shot types considered in this rule with the other nontoxic shot types already in the table.

Many hunters believe that some nontoxic shot types do not compare favorably to lead and that they may damage some shotgun barrels, and a small percentage of hunters have not complied with nontoxic shot regulations. Allowing use of additional nontoxic shot types may encourage greater hunter compliance and participation with nontoxic shot requirements and discourage the use of lead shot. The use of nontoxic shot for waterfowl hunting has increased in recent years (Anderson *et al.* 2000), but we believe that compliance will continue to increase with the availability and approval of other nontoxic shot types. Increased use of nontoxic shot will enhance protection of migratory waterfowl and their habitats. More important, however, is that the Fish and Wildlife Service is obligated to consider all complete nontoxic shot submissions.

We also add a column to the table of approved shot types that lists the field testing device suitable for each shot type. The information in this column is strictly informational, not regulatory. Because these regulations are used by both waterfowl hunters and law enforcement officers, we believe that information on suitable testing devices is a useful addition to the table.

Affected Environment

Waterfowl Populations

The taxonomic family Anatidae, principally subfamily Anatinae (ducks) and their habitats, comprise the affected environment. Waterfowl habitats and populations in North America in 2005 were described by the U.S. Fish and Wildlife Service (Garrettson *et al.* 2005). In the Waterfowl Breeding Population and Habitat Survey traditional survey area (strata 1–18, 20–50, and 75–77), the total duck population estimate was 31.7 ± 0.6 [SE] million birds, similar to last year's estimate of 32.2 ± 0.6 million birds but 5% below the 1955–2004 long-term average. Mallard *(Anas platyrhynchos)* abundance was 6.8 ± 0.3 million birds, which was 9% below the 2004 estimate of 7.4 ± 0.3 million birds and 10% below the long-term average. Blue-winged teal *(Anas discors)* abundance was 4.6 ± 0.2 million birds, similar to the 2004 estimate of 4.1 ± 0.2 million birds, and the long-term average. Of the other duck species, the gadwall estimate (*Anas strepera*; 2.2 ± 0.1 million) was 16% below that of 2004, while estimates of northern pintails (*Anas acuta*; 2.6 ± 0.1 million; +17%) and northern shovelers (*Anas clypeata*; 3.6 ± 0.2 million; +28%) were significantly above their 2004 estimates. The estimate for northern shovelers was 67% above the long-term average for the species, and the estimates for gadwall (+30%) and green-winged teal (*Anas crecca*; 2.2 ± 0.1 million; +16%) also were above their average values. Northern pintails remained 38% below their long-term average despite this year's increase in abundance. Estimates of American wigeon (*Anas americana*; 2.2 ± 0.1 million; -15%) and scaup (*Aythya affinis* and *Aythya marila* combined; 3.4 ± 0.2; -35%) also were below their respective long-term averages; the estimate for scaup was a record low. Abundances of redheads *(Aythya americana)* and canvasbacks *(Aythya valisineria)* were similar to last year's counts and long-term averages. The projected mallard fall flight index of 9.3 ± 0.1 million was similar to the 2004 estimate of 9.4 ± 0.1 million birds.

In the restratified eastern survey area, mergansers (*Mergus serrator, M. merganser,* and *Lophodytes cucullatus* together) were down 25%, mallards were down 36%, American black ducks *(Anas rubripes)* were down 24%, and green-winged teal were 46% below their 2004 estimates. Ring-necked ducks *(Aythya collaris)* and goldeneyes (common [*Bucephala clangula*] and Barrow's [*Bucephala islandica*]) were similar to their 2004 estimates. No species in the eastern survey area differed from its long-term average.

Habitats

Waterfowl hunting occurs in habitats used by many taxa of migratory birds, as well as by aquatic invertebrates, amphibians and some mammals. Fish also may be found in many hunting locations. The total May pond estimate (Prairie and Parkland Canada and the northcentral U.S. combined) was 5.4 ± 0.2 million ponds, which is 37% greater than the 2004 estimate of 3.9 ± 0.2 million ponds and 12% higher than the long-term average of 4.8 ± 0.1 million ponds. The 2005 pond estimate in Prairie and Parkland Canada was 3.9 ± 0.2 million, a 56% increase relative to last year's estimate of 2.5 ± 0.1 million ponds and 17% higher than the long-term average of 3.3 ± 0.3 million ponds. The 2005 pond estimate for the northcentral U.S. (1.5 ± 0.1 million) was similar to last year's estimate.

Characterization of the Four Shot Types

TICN Alloys

Spherical Precision, Inc. of Tustin, CA, submitted Tungsten-Iron-Copper-Nickel (TICN) shot for approval. This is an array of layered alloys or metals of 40–76 percent tungsten, 10–37 percent iron, 9–16 percent copper, and 5–7 percent nickel. TICN shot has a density ranging from 10.0 to 14.0 grams per cubic centimeter (g/cm^3), is noncorrosive, and is magnetic. Spherical Precision estimates that the volume of TICN shot for use in hunting migratory birds in the United States will be approximately 50,000 pounds (lb) (22,700 kilograms (kg)) during the first year of sale, and perhaps 100,000 lb (45,400 kg) per year thereafter.

ITN Alloys

ENVIRON-Metal of Sweet Home, OR, submitted Iron-Tungsten-Nickel (ITN) alloys, which are cast alloys containing 10–70 percent iron, 20–70 percent tungsten, and 10–40 percent nickel. The proposed shot types have densities ranging from about 8.5 to about 13.5 g/cm^3. The compositions of the alloys were shown in the proposed rule (70 FR 49541).

ENVIRON-Metal estimated that the yearly volume of ITN shot types with densities between those of steel (7.86 g/cm^3) and lead (11.3 g/cm^3) expected for use in hunting migratory birds in the United States is approximately 200,000 lb (113,500 kg) during the first year of sale. In the second year and beyond, sales upwards of 500,000 lb (227,000 kg) per year are anticipated. ITN shot types with densities greater than that of lead may ultimately attain sales levels of 1,000,000 lb (454,000 kg) per year.

TB Shot

The Olin Corporation of East Alton, IL, submitted Tungsten-Bronze (TB) shot for approval. This is a sintered

composite with an average composition of 60 percent tungsten, 35.1 percent copper, 3.9 percent tin, and 1 percent iron. The copper and tin make up 39 percent of the shot as a 90:10 ratio, respectively, in the form of a bronze alloy. The shot has a density of 12.0 g/cm^3, compared to 11.1–11.3 g/cm^3 for lead, and 7.9 g/cm^3 for steel. Olin estimated that the yearly volume of the TB shot in hunting migratory birds in North America will be approximately 300,000 lb (136,200 kg).

TTI Shot

Tungsten-Tin-Iron (TTI) shot, submitted by Nice Shot, Inc., of Albion, PA, is a cast alloy composed of 58 percent tungsten, 38 percent tin, and 4 percent iron. This shot type has a density of 11.0 g/cm^3. Nice Shot, Inc. estimated that approximately 5,000 lb (2,270 kg) of TTI shot are expected to be sold for use in hunting migratory birds in the United States during the first year of sale. TTI shot contains less than 1 percent lead, and will not be coated.

Each of the four shot types has a residual lead level of less than 1 percent. To inhibit corrosion, TICN shot may be coated with tin, copper, or both, and ITN shot may be surface-coated with thin petroleum-based films. Neither TB nor TTI shot will be coated.

In current 50 CFR 20.21(j)(1), the percent composition by weight for tunsten-tin-bismuth is ''49–71 tungsten, 29–51 tin; 0.5–6.5 bismuth, 0.8 iron''. The proposed rule presented this same formulation. However, because we have already approved shot types of 100 percent of each of these metals, we now approve any alloys of them. Therefore, the rule text now reflects that the percent composition by weight for tungsten-tin-bismuth alloys is now ''any proportions of tungsten, tin, and bismuth''.

Effects of the Approvals on Migratory Waterfowl

Approving additional nontoxic shot types will likely result in a minor positive long-term impact on waterfowl and wetland habitats. Approval of the four shot types and additional alloys as nontoxic would have a positive impact on the waterfowl resource.

Cumulative Impacts

We foresee no negative cumulative impacts of approval of the four shot types and the additional alloys for waterfowl hunting. Their approval should help to further reduce the negative impacts of the use of lead shot for hunting waterfowl and coots.

Literature Cited

Anderson, W. L., S. P. Havera, and B. W. Zercher. 2000. Ingestion of lead and nontoxic shotgun pellets by ducks in the Mississippi flyway. Journal of Wildlife Management 64:848–857.

Garrettson, P. R., T. J. Moser, and K. Wilkins. 2005. Waterfowl population status, 2005. U.S. Fish and Wildlife Service, Washington, D.C.

NEPA Consideration

In compliance with the requirements of section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(C)), and the Council on Environmental Quality's regulations for implementing NEPA (40 CFR parts 1500–1508), though all of the metals in these shot types have been approved in other shot types and are not likely to pose adverse toxicity effects on fish, wildlife, their habitats, or the human environment, we have completed Final Environmental Assessments and found no significant environmental impact from this action.

Endangered Species Act Considerations

Section 7 of the Endangered Species Act (ESA) of 1972, as amended (16 U.S.C. 1531 *et seq.*) provides that Federal agencies shall ''insure that any action authorized, funded or carried out * * * is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of (critical) habitat.'' We have concluded that because all of the metals in these shot types have been approved in other shot types and will not be released to the environment (dissolved from the shot) by any of them, the metals will not be available to biota in significant amounts due to use of any of the four shot types. Therefore, this action will not affect endangered or threatened species.

Executive Order 12866

This rule is not a significant regulatory action subject to Office of Management and Budget (OMB) review under Executive Order 12866. This rule will not have an annual economic effect of $100 million or more or adversely affect an economic sector, productivity, jobs, the environment, or other units of government. Therefore, a cost-benefit economic analysis is not required. This action will not create inconsistencies with other agencies' actions or otherwise interfere with an action taken or planned by another agency. No other Federal agency has any role in regulating nontoxic shot for migratory bird hunting. The action is consistent with the policies and guidelines of other Department of the Interior bureaus. This action will not materially affect entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients because it has no mechanism to do so. This action will not raise novel legal or policy issues because the Service has already approved several other nontoxic shot types.

Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (5 U.S.C. 601 et seq.) requires the preparation of flexibility analyses for rules that will have a significant economic impact on a substantial number of small entities, which include small businesses, organizations, or governmental jurisdictions. This rule approves four additional types of nontoxic shot that may be sold and used to hunt migratory birds. We have determined, however, that this rule will have no effect on small entities since the approved shot merely will supplement nontoxic shot types already in commerce and available throughout the retail and wholesale distribution systems. We anticipate no dislocation or other local effects, with regard to hunters and others.

Small Business Regulatory Enforcement Fairness Act

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This rule will not have an annual effect on the economy of $100 million or more; will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; and does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

Paperwork Reduction Act

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. We have examined this regulation under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501) and found it to contain no new information collection requirements. OMB has assigned control number 1018–0067 to the collection of information that shot manufacturers are required to provide to us for the nontoxic shot approval process. This approval expires December 31, 2006. For further information, see 50 CFR 20.134.

Unfunded Mandates Reform

We have determined and certify pursuant to the Unfunded Mandates Reform Act, 2 U.S.C. 1502 et seq., that this rulemaking will not significantly or uniquely affect small governments or produce a Federal mandate of $100 million or more in any given year. Therefore, this rule does not constitute a significant regulatory action under the Unfunded Mandates Reform Act.

Civil Justice Reform—Executive Order 12988

In promulgating this rule, we have determined that these regulations meet the applicable standards provided in Sections 3(a) and 3(b)(2) of Executive Order 12988.

Takings

In accordance with Executive Order 12630, this rule, authorized by the Migratory Bird Treaty Act, does not have significant takings implications and does not affect any constitutionally protected property rights. This rule will not result in the physical occupancy of property, the physical invasion of property, or the regulatory taking of any property. A takings assessment is not required.

Federalism Effects

This rule does not have a substantial direct effect on fiscal capacity, change the roles or responsibilities of Federal or State governments, or intrude on State policy or administration. In accordance with Executive Order 13132, this regulation does not have significant federalism effects, nor does it have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994, ''Government-to-Government Relations with Native American Tribal Governments'' (59 FR 22951) and 512 DM 2, we have determined that this rule has no effects on Federally recognized Indian tribes.

List of Subjects in 50 CFR Part 20

Exports, Hunting, Imports, Reporting and recordkeeping requirements, Transportation, Wildlife.

■ For the reasons discussed in the preamble, we amend part 20, subchapter B, chapter I of Title 50 of the Code of Federal Regulations as follows:

PART 20—[AMENDED]

■ 1. The authority citation for part 20 continues to read as follows:

Authority: 16 U.S.C. 703–712; 16 U.S.C. 742a–j; Pub. L. 106–108.

■ 2. Section 20.21 is amended by revising paragraph (j) to read as follows:

§ 20.21 What hunting methods are illegal?

* * * * *

(j) While possessing loose shot for muzzle loading or shotshells containing other than the following approved shot types.

Approved shot type *	Percent composition by weight	Field testing device **
bismuth-tin	97 bismuth, 3 tin	HOT*SHOT®. ***
iron (steel)	iron and carbon	Magnet or HOT*SHOT®.
iron-tungsten	any proportion of tungsten, ≥1 iron	Magnet or HOT*SHOT®.
iron-tungsten-nickel	≥1 iron, any proportion of tungsten, up to 40 nickel.	Magnet or HOT*SHOT®. **
tungsten-bronze	51.1 tungsten, 44.4 copper, 3.9 tin, 0.6 iron and 60 tungsten, 35.1 copper, 3.9 tin, 1 iron.	Rare Earth Magnet.
tungsten-iron-copper-nickel	40–76 tungsten, 10–37 iron, 9–16 copper, 5–7 nickel.	HOT*SHOT® or Rare Earth Magnet.
tungsten-matrix	95.9 tungsten, 4.1 polymer	HOT*SHOT®.
tungsten-polymer	95.5 tungsten, 4.5 Nylon 6 or 11	HOT*SHOT®.
tungsten-tin-iron	any proportions of tungsten and tin, ≥1 iron	Magnet or HOT*SHOT®.
tungsten-tin-bismuth	any proportions of tungsten, tin, and bismuth.	Rare Earth Magnet.
tungsten-tin-iron-nickel	65 tungsten, 21.8 tin, 10.4 iron, 2.8 nickel	Magnet.

* Coatings of copper, nickel, tin, zinc, zinc chloride, and zinc chrome on approved nontoxic shot types also are approved.
** The information in the ''Field Testing Device'' column is strictly informational, not regulatory.
*** The ''HOT*SHOT'' field testing device is from Stream Systems of Concord, CA.

* * * * *

Dated: January 13, 2006.

Paul Hoffman,

Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 06–745 Filed 1–25–06; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 216

[Docket No. 011011247–6006–03; I.D. 082701E]

RIN 0648–AP62

Taking and Importing Marine Mammals; Taking Marine Mammals Incidental to Rocket Launches from Kodiak Island, AK

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Final rule.

SUMMARY: NMFS, upon application from the Alaska Aerospace Development Corporation (AADC), is issuing regulations to govern the unintentional takings of small numbers of marine mammals incidental to rocket launches from the Kodiak Launch Complex (KLC) on Kodiak Island, AK. Issuance of regulations is required by the Marine Mammal Protection Act (MMPA) when the Secretary of Commerce (Secretary), after notice and opportunity for comment, finds, as here, that such takes will have a negligible impact on the species and stocks of marine mammals and will not have an unmitigable adverse impact on their availability for subsistence uses. These regulations do not authorize AADC's rocket launch activities, as such authorization is not within the jurisdiction of the Secretary.

Rather, these regulations govern the issuance of ''Letters of Authorization'' (LOAs) for the unintentional incidental take of marine mammals in connection with this activity and prescribe methods of taking and other means of effecting the least practicable adverse impact on marine mammal species and their habitat, and on the availability of the species for subsistence uses. In addition, NMFS incorporates reporting and monitoring requirements.

DATES: Effective from February 27, 2006 through February 28, 2011.

A copy of the AADC application which contains a list of the references used in this document may be obtained by writing to Steve Leathery, Division of Permits, Conservation, and Education, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910–3226 or by telephoning the contact listed here (see **FOR FURTHER INFORMATION CONTACT**). The NMFS Administrative Record will be maintained at the above address.

Comments regarding the burden-hour estimate or any other aspect of the collection of information requirement contained in this proposed rule should be sent to NMFS via the means stated above, and to the Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Attention: NOAA Desk Officer, Washington, DC 20503, *David__Rustker@eap.omb.gov*.

FOR FURTHER INFORMATION CONTACT: Jolie Harrison, (301) 713–2289 ext 166, or Brad Smith, (907) 271–3023.

SUPPLEMENTARY INFORMATION:

Background

Section 101(a)(5)(A) of the MMPA(16 U.S.C. 1361 *et seq.*) directs the Secretary to allow, upon request, the incidental, but not intentional taking of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and regulations are issued.

Authorization may be granted for periods of 5 years or less if the Secretary finds that the total taking will have a negligible impact on the species or stock(s), will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses, and regulations are prescribed setting forth the permissible methods of taking, other means of effecting the least practicable adverse impact on the affected species or stocks and their habitats, and the requirements pertaining to the monitoring and reporting of such taking.

NMFS has defined ''negligible impact'' in 50 CFR 216.103 as ''an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.''

Except with respect to categories of activities not pertinent here, the MMPA defines ''harassment'' as:

> any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild [Level A harassment]; or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering [Level B harassment].

Summary of Request

On July 26, 2001, NMFS received an application from the AADC under section 101(a)(5)(A) of the MMPA for authorization to take, by harassment, Steller sea lions (*Eumetopias jubatus*) incidental to rocket launches from KLC on Kodiak Island, Alaska. A proposed rule was published on October 29, 2004 (69 FR 63114). Comments on the proposed rule received from the Marine Mammal Commission (MMC) recommended NMFS consider also authorizing take of Pacific harbor seals (*Phoca vitulina richardsi*), as they are also found in the vicinity of KLC. After consulting with AADC and reanalyzing the distribution and habits of harbor seals in the area, NMFS has included take of harbor seals in the final rule. These regulations will allow NMFS to issue annual Letters Of Authorization (LOAs) to the AADC. A full description of the operations is contained in the AADC application (AADC, 2001) which is available upon request (see **ADDRESSES**) or at: *http://www.nmfs.noaa.gov/prot__res/PR2/Small__Take/smalltake__info.htm#applications*.

The KLC is a commercial rocket launch complex owned and operated by the State of Alaska through the AADC. Located wholly on state-owned lands, KLC occupies 43 acres (0.2 km^2) within a 3,100 acre (12.6 km^2) parcel on the eastern side of Kodiak Island on the Narrow Cape peninsula. The KLC was designed to accommodate a variety of small, solid rockets including such vehicles as the Minuteman II, Taurus, Conestoga, and Athena (Lockheed Martin Launch Vehicle). The largest vehicle that can be launched from KLC is the Athena–2 (Lockheed Martin Vehicle–2).

Launch operations at the KLC are authorized under license from the Federal Aviation Administration (FAA), Office of Associate Administrator for Commercial Space Transportation (AST), in accordance with the facility's Environmental Assessment (EA) and stipulations in the EA's Finding of No Significant Impact (FONSI) (see 61 FR 32884, June 25, 1996). These stipulations included a requirement to develop a Natural Resource Management Plan (NRMP) to address monitoring and mitigation activities for protected species in the area. This plan was developed in coordination with NMFS utilizing comparison of anticipated sound pressure levels from rocket motors to be launched from the KLC with documented marine mammal disturbance responses to such noise.

Measurement of Airborne Sound Levels

The following section is provided to facilitate an understanding of airborne and impulsive noise characteristics. Amplitude is a measure of the pressure of a sound wave that is usually expressed on a logarithmic scale with units of sound level or intensity called the decibel (dB). Sound pressure level (SPL) is described in units of dB re micro-Pascal (micro-Pa); for energy, the sound energy level (SEL), a measure of the cumulative energy in a noise event, is described in terms of dB re micro-Pa^2–second (dB re micro-Pa^2–s); and frequency, often referred to as pitch, is described in units of cycles per second or Hertz (Hz). In other words, SEL is the squared instantaneous sound pressure over a specified time interval, where the sound pressure is averaged over 5 percent to 95 percent of the duration of the sound.

For airborne noise measurements the convention is to use 20 micro-Pa as the reference pressure, which is the approximate threshold for onset of human hearing and is 26 dB above the underwater sound pressure reference of 1 micro-Pa and is. However, the conversion from air to water intensities is more involved than this and is beyond the scope of this document. NMFS recommends interested readers review NOAA's tutorial on this issue: *http://www.pmel.noaa.gov/vents/acoustics/tutorial/tutorial.html*.

Airborne sounds are also often expressed as broadband A-weighted (dBA) or C-weighted (dBC) sound levels. When frequency levels are made to correspond to human hearing, they are referred to as being A-weighted or A-filtered. With A-weighting, sound energy at frequencies below 1 kHz and above 6 kHz are de-emphasized and approximates the human ear's response to sounds below 55 dB. C-weighting is often used in the analysis of high-

amplitude noises like explosions, and corresponds to the relative response to the human ear to sound levels above 85 dB. C-weighting de-emphasizes ear frequency components of less than about 50 Hz. C-weight scaling is also useful for analyses of sounds having predominantly low-frequency sounds, such as sonic booms. For continuous noise like rocket launches, the important variables relevant to assessing auditory impacts or behavioral responses are intensity, frequency spectrum, and duration. In this document, sound levels have been provided with A-weighting.

Description of the Activity

To date there have been eight rocket launches from the KLC; however, the KLC facility is licensed to launch up to nine rockets per year. The first two launches used composite vehicles built from several stages taken from a decommissioned USAF Minuteman II launch vehicle, and were part of the U.S. Air Force (USAF) atmospheric interceptor technology (ait) program. The third and the sixth launches (March 2001 and April 2002) were part of the USAF Quick Reaction Launch Vehicle (QRLV) program, and comprised of single stage M–56 motors taken from a decommissioned USAF Minuteman II launch vehicle. The fourth launch (September 2001) was a commercial Lockheed/Martin Athena rocket, which is the largest vehicle to be launched from KLC, and it placed four satellites into polar orbit. The fifth, seventh, and eighth launches (November 2001, December 2004, and February 2005) were Department of Defense (DoD) Strategic Target System (STARS) vehicles and consisted of the first two stages of a decommissioned A–3 missile and an Orbis third stage.

Launches from the KLC are expected to be at high inclination with launch azimuths ranging from 125 to 225 degrees in direction (AADC and AST, 1996). At the easternmost azimuth, launch vehicle paths would pass over the eastern edge of Ugak Island; at the westernmost azimuth, the vehicle would pass along the southeastern edge of the Kodiak Archipelago. Approximately 70 seconds after launch, a typical launch vehicle would be more than 8 miles (12.5 km) high. Spent first-stage rocket motors and fuel casings would impact the ocean's surface from 11 to 314 n-mi (20 to 582 km) downrange, depending on the launch vehicle (AADC and AST, 1996). Rocket motor sonic booms are predicted to reach the ocean surface over 20 miles (32 km) downrange beyond the outer continental shelf over deep ocean.

Launch operations are a major source of noise on Kodiak Island, as the operation of launch vehicle engines produces significant sound levels. Generally, four types of noise occur during a launch. They are: (1) Combustion noise from launch vehicle chambers; (2) jet noise generated by the interaction of the exhaust jet and the atmosphere; (3) combustion noise from the post-burning of combustion products; and (4) sonic booms. The principal objective of the KLC rocket motor noise monitoring task within the NRMP was to measure A-weighted Sound Energy Levels (ASELs) at the Ugak Island Steller sea lion haulout. A secondary objective was to monitor sound levels on Narrow Cape close to bald eagle and/or Steller's eider nests when present. ASELs were successfully recorded for the first four and the seventh launches from KLC at the Ugak Island Steller sea lion haulout and on Narrow Cape by the University of Alaska Anchorage's Environment and Natural Resources Institute (ENRI). The Ugak Island haulout is located approximately 2 miles (3.2 km) from Narrow Cape and about 3.5 miles (5.6 km) from the KLC launch pad on a narrow sand spit on the north side of the Island. The data gathered were weighted toward frequencies that humans are more sensitive to (1–6 kHz, A-weighted) and showed a wide variation in sound pressures among rocket motors, with the highest levels being associated with the largest launch vehicle flown. Variations in the KLC sound pressure record are likely due to such variables as engine size, engine bell shape, and local atmospheric conditions. Summaries of the findings for each of the measured rocket launches to date are described below. A complete description of the proposed rocket launches from KLC may be found in AADC's application, which may be viewed at: *http://www.nmfs.noaa.gov/prot_res/PR2/Small_Take/smalltake_info.htm#applications*. This information is incorporated into this document by reference.

ait–1

The first launch from KLC occurred in November 1998, and was the first of the USAF ait program. Sound measurements from the ait–1 launch were collected using two sound level monitors (SLMs) that were deployed 26 hours before launch on Ugak Island at the base of the spit used as a haulout by Steller sea lions. The SLMs were set to highlight sounds exceeding 65 dB, which was done after checking real-time sound levels in the field at each site prior to setting them to record data. If the exceedance levels were set too low, the SLMs would be deluged with data, and if they were set too high the SLMs would miss the event of interest. A digital audio tape (DAT) recorder was used to provide redundancy in recording noise frequencies and was placed about 0.75 mi (1.2 km) from the KLC launch pad.

Recorded sound pressure levels (SPLs) of rocket motor noise for the ait–1 at the Ugak Island haulout site were 78.2 dB re 20 microPa with a peak level of 97 dB (Table 1). The associated ASEL at the Ugak Island haulout was 88.4 dB re 20 microPa2 s. In addition, the ASEL at the nearest location measured by the DAT recorder was 110 dB for a duration of 59 seconds. The bulk of the sound energy was at low frequencies and generally less than 4000 Hz. Most of the energy was from 100 to 500 Hz.

Table 1. Sound measurements taken by ENRI during launches at KLC. SPL represents the maximum A-weighted sound pressure level, which is the greatest of averages of root mean square instantaneous sound pressure levels during either 125 ms or 1 s period across the whole sound spectrum. The A-weighted sound exposure level (ASEL) is a composite cumulative energy metric comprising amplitude with duration. "A-weighted" refers to frequency-dependent weighting factors applied to the sound accordance with the sensitivity of the human ear to deemphasize sounds below 1 kH and above 6 kH.

Launch Vehicle	Location Measured	Duration (second)	ASEL (dB re 20 microPa^2 s)	SPL (dB re 20 microPa)	Avg Freq. (Hertz)	Max Freq. (Hertz)
ait-1	Ugak Island	33	88.4	78.2	100-500	4000
	Narrow Cape	391	113.4	104.9	100-500	4000
ait-2	Ugak Island	30	92.2	81.5	25-1000	2500
	Narrow Cape	34	110.7	103.2	25-1000	2500
QRLV-1	Ugak Island	10.9	80.3	73.3	16-2000	2500
	Narrow Cape	32.2	102.4	95.2	16-2000	2500
Athena	Ugak Island	49.6	101.4	90.8	<2000	10000
	Narrow Cape	44.6	115.4	106.7	<2000	10000
STARS IFT-13C	Narrow Cape	51.6	114.3	105.2		5000

Of the eight noise events recorded above 65 dB at Ugak Island, ENRI determined that two are attributable to helicopter noise and one to the firing of the ait–1 rocket motor. Sounds at the Ugak Island site were above 65 dB for a total of 33 seconds at the time the rocket motor was firing. Due to the isolation of this site, the remainder of the events are most likely attributable to surf or wind action.

ait–2

USAF launched a second rocket from KLC on September 15, 1999. Based on experience from the first launch, ENRI set the SLMs to highlight sounds exceeding 70 dB and deployed them about 19 hours before the launch. Sound pressures at Ugak Island were slightly higher for the second launch than for the first launch. Recorded maximum SPLs of rocket motor noise for the ait–2 at the Ugak Island haulout site were 81.5 dB, with a peak level of 101.5 dB, and a corresponding SEL of 92.2 dB. The bulk of the sound energy was at low frequencies and generally less than 2500 Hz. Most of the energy was from 25 to 1000 Hz.

There were 15 noise events above 70 dB within the 19 hours of recording at Ugak Island, all of which can be attributed to helicopter, airplane, or rocket noise; none coincides with a stampede of Steller sea lions off the Ugak Island haulout 3.5 hours previous to the rocket launch. Sounds at the Ugak Island site were above 70 dB for a total of 30 seconds at the time the rocket motor was firing. Natural background noise levels above 70 dB were almost nonexistent during this launch.

QRLV–1

On March 22, 2001, the USAF conducted the third launch from KLC. SLMs set to highlight sounds exceeding 70 dB at the base of the Ugak Island sea lion haulout were again used by ENRI to record sound frequency and intensity, and were deployed 22 hours before the launch. The recorded sound levels at Ugak Island were significantly lower for the QRLV–1 launch than for either of the ait launches. This is likely due to the vehicle being smaller, and possibly to a different trajectory and local atmospheric condition. Recorded maximum SPLs resulting from QRLV rocket motor noise at the Ugak Island haulout site were 73.3 dB, with a peak level of 87.2 dB, and a corresponding SEL of 80.3 dB. The bulk of the sound energy was at low frequencies and generally less than 2500 Hz. Most of the energy was from 16 to 2000 Hz.

There were 17 noise events above 70 dB at Ugak Island. With the exception of the rocket launch, all can be related to helicopter noise. Sounds at the Ugak Island site were above 70 dB for a total of 10.9 seconds at the time the rocket motor was firing. Natural background noise levels above 70 dB were almost nonexistent during this launch. Rocket noise measurements for the QRLV–2 rocket launch on April 24, 2002, the sixth rocket launched from KLC, were not recorded, though most likely they would be similar to those measured during the first QRLV launch.

Athena

The fourth launch from KLC occurred on September 29, 2001, and involved a commercial Lockheed/Martin Athena, which is the largest vehicle to be launched from KLC. SLMs were again set to highlight sounds exceeding 70 dB and were deployed by ENRI at the Ugak Island haulout four hours before the launch. The recorded sound levels at Ugak Island were significantly higher for the Athena launch than for previous launches, which is likely due to the size of the vehicle. Recorded maximum SPLs resulting from Athena rocket motor noise at the Ugak Island haulout site were 90.8 dB, with a peak level of 115.9 dB, and a corresponding SEL of 101.4

dB. The bulk of the sound energy was at low frequencies and generally less than 2000 Hz.

There were three exceedance events above 70 dB at Ugak Island and Narrow Cape within the four hours of recording, two of which can be attributed to helicopter noise and the other to the rocket launch. Sounds at the Ugak Island site were above 70 dB for 49.6 seconds at the time the rocket motor was firing. Natural background noise levels above 70 dB were nonexistent during this launch.

STARS

On November 9, 2001, the Department of Defense launched a STARS vehicle from KLC; however, the rocket was deliberately destroyed over open ocean almost immediately because it lost communication with KLC. The STARS program provides ballistic missile targets to test various sensors and ground-based interceptors. STARS vehicles will include first- and second-stage Polaris A3 boosters and a third-stage Orbus–1 booster. The range of this system is 620 to 3,418 miles (998 to 5500 km).

The seventh launch from KLC, of the STARS IFT 13C, occurred on December 14, 2004. SLMs were set to highlight sounds exceeding 70 dB and were deployed by ENRI only at Narrow Cape (because sea lions were not present at Ugak Island) eight hours before the launch. Narrow Cape is significantly closer to the launch site than Ugak Island. The recorded sound levels at Narrow Cape were higher for this launch than for previous launches, which is likely due to a different trajectory and local atmospheric conditions. Recorded maximum SPLs resulting from rocket motor noise at Narrow Cape were 105.2 dB, with a peak level of 128.8 dB, and a corresponding SEL of 114.3 dB. The bulk of the sound energy was at low frequencies and generally less than 2000 Hz. There were over three hundred exceedance events above 70 dB at Narrow Cape within the eighteen hours of recording, two of which can be attributed to helicopter noise and the other to the rocket launch. With the exception of helicopter noise and the rocket launch, all exceedances at or just above 70 dB can be connected to weather-related noise (wind and rain).

Rocket noise measurements for the STARS IFT 14 rocket launch on February 13, 2005, the eighth rocket launched from KLC, were not recorded, though most likely they would be similar to those measured during the STAR IFT 13C launch.

Comments and Responses

On October 29, 2004 (69 FR 63114), NMFS published a notice of proposed rulemaking on AADC's request to take marine mammals incidental to rocket launches at KLC and requested comments, information and suggestions concerning the request. During the 45–day public comment period, NMFS received comments from three members of the public and the MMC. The MMC supports NMFS' intent to implement incidental take regulations for the AADC's activities at KLC provided that the mitigation and monitoring activities described in the AADC application for regulations are incorporated into the proposal.

Comment 1: The MMC noted that harbor seals and other marine mammals occur in the vicinity of KLC and recommended that NMFS consider providing additional coverage to the applicant by authorizing take of harbor seals and other marine mammals to reduce the possibility that the applicant may engage in an impermissible taking.

Response: After reviewing available information regarding the abundance, distribution, and behavior of marine mammals around KLC and consulting with AADC, NMFS has included authorization for the take of harbor seals in this final rule. NMFS determined, however, that no other marine mammals were likely to be taken by the rocket launches, and, therefore, AADC has not been authorized for the take of any other marine mammal species.

Comment 2: The MMC recommended that AADC contact the U.S. Fish and Wildlife Service (USFWS) to determine if authorization for the incidental taking of small numbers of sea otters is needed.

Response: AADC is consulting with the USFWS regarding potential take of sea otters.

Comment 3: The MMC further recommended that the proposed monitoring program be expanded to determine the effects on harbor seals, sea otters, and other marine mammal species to determine if authorizations for these species are needed or, if authorization to take these species is provided, to verify that the impacts on the affected stocks are negligible.

Response: As take of harbor seals is authorized under this rule, comprehensive requirements for the monitoring of harbor seals are now included. Additionally, AADC is required to report sightings of any marine mammals seen during aerial surveys or on videotapes.

Comment 4: One commenter expressed strong objections to the rocket launch facility and asserted that it was damaging to the ecosystem and a waste of money.

Response: These regulations do not authorize AADC's rocket launch activities, because such authorization is not within the jurisdiction of the Secretary. Rather, these regulations authorize the unintentional incidental take of marine mammals in connection with this activity and prescribe methods of taking and other means of effecting the least practicable adverse impact on marine mammal species and their habitat, and on the availability of the species for subsistence uses. Thus, the comment is outside of the scope of this rulemaking.

Comment 5: Another commenter also objected forcefully to the project (see response to Comment 4, above) and further asserted that there is no reason to allow this killing of marine mammals. This commenter also expressed doubt in the accuracy of the measured noise levels at the site.

Response: Section 101(a)(5)(A) of the Marine Mammal Protection Act (MMPA) (16 U.S.C. 1361 *et seq.*) states that the Secretary *shall* allow the incidental, but not intentional taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and regulations are issued. NMFS has determined that this activity will take only small numbers of marine mammals, that the taking will have a negligible impact on the affected species or stocks, and that the activity will not have an unmitigable adverse effect on the availablility of the species or stock for subsistence uses. NMFS has also set forth permissible methods of taking, means of effecting the least practicable adverse effect on the species or stock, and requirements pertaining to the monitoring and reporting of such taking. Therefore, NMFS has promulgated these regulations and will issue the authorization.

The sound measurements reported from Ugak Island are similar in level to those reported at other launch sites. If information were provided to NMFS that suggested AADC's sound measurements were incorrect, NMFS would investigate. The rule includes the following requirement: ''In coordination and compliance with the Alaska Aerospace Development Corporation, the National Marine Fisheries Service may place an observer on Kodiak or Ugak Islands for any marine mammal monitoring activity prior to, during, or after a missile launch to monitor impacts on marine mammals, provided observers are not within the calculated

danger zone of the rocket's flight path during a launch.''

Description of Habitat and Marine Mammals Affected by the Activity

The KLC is located on the southeast facing tip of a small peninsula on the eastern side of Kodiak Island. The rocket launch site is approximately one mile (1.6 km) from the southeast shore (Narrow Cape). The primary KLC environmental monitoring study area, and area of anticipated effects, was set in September 1996 at a meeting between AADC and representatives of the USFWS, NMFS, the FAA, and ENRI. The area was chosen based on modeled ASELs and includes the lands and waters within a 6–mile (9.7–km) radius extending out from the KLC launchpad. The only marine mammal haulouts within this area are on Ugak Island.

Ugak Island is a triangular-shaped island located about 3.5 miles (5.6 km) southeast of the launch site. The north side of Ugak island culminates in a sandy spit on the west end where most of the sea lions haul out, though some also haul out at the southern tip of the island. The southeastern facing side of the island, where most of the harbor seals haul out, is very rocky, backed by 300–ft (91–km) cliffs (or higher), and is subject to very strong wave action. The west side of the island is steeper than the north side, but not as steep as the east, but does not appear to be used much by either pinniped.

Narrow Cape, Ugak Island, and the adjacent waters within the primary KLC study area provide habitat for sea otters, harbor seals, Steller sea lions (listed as endangered), gray whales, humpback whales (listed as endangered), northern fur seals, northern right whales, and minke whales. Harbor seals and sea otters are common year-round, as are killer whales, Dall's porpoise, and harbor porpoise. Other species of cetaceans that may occur in the area, such as Pacific white-sided dolphins, Risso's dolphins, northern right whale dolphins, pilot whales, Cuvier's beaked whales, Baird's beaked whale, Stegneger's beaked whale, sperm whales, fin whales, sei whales and blue whales are rare as they are primarily pelagic (ENRI, 1995–98). General information on harbor seals and other marine mammal species can be found in Angliss and Lodge (2004), which are available at the following URL: *http://www.nmfs.noaa.gov/prot__res/PR2/Stock__Assessment__Program/sars.html.* Sea otters (*Enhydra lutris*) are managed by the USFWS. Information on this species may be found at *www.fws.gov*. Please refer to those documents and the application for further information on these species.

Steller Sea Lions

The Steller sea lion is described by two stocks - those west of 144° W. long. listed as endangered under the ESA, and the eastern stock listed as threatened under the ESA. Sea lions hauled out on Ugak Island, the northern spit of which is designated as critical habitat for this species, are of the western stock. The most recent comprehensive estimate (pups and non-pups) of Steller sea lion abundance in Alaska is based on aerial surveys of non-pups in June 2002 and ground based pup counts in June and early July of 2001 and 2002. Data from these surveys represents actual counts at all major rookeries and haulouts. The best available minimum population estimate for the western stock of Steller sea lions is the sum of the total number of non-pups counted in 2002 (26,602) and the number of pups counted in 2001 and 2002 (9,211), which is 34,779 (Angliss and Lodge, 2004). This is considered a minimum estimate because it has not been corrected to account for animals which were at sea during the surveys. Though non-pup numbers increased 5.5–13.7 percent from 2000–2002, the 2002 count was still 5.4 percent below the 1998 count and 36.7 percent below the 1990 count and the long-term, average decline for 1990–02 is 4.3 percent per year (Angliss and Lodge, 2004).

On Ugak Island sea lions haul out primarily on the northern-most sand spit of the island, but also less frequently on the east/south side of the island. These haulouts are occupied primarily from late June to early October. Opportunistic counts of Steller sea lions conducted at Ugak Island every year since 1993 indicate a maximum of over 350 animals in the fall of 1997 and a steady decrease in numbers to less than 40 since 2001 (Kate Wynne, pers. comm, 2005). Two of the 8 launches have occurred during times when sea lions are typically present, during September of 1999, 60–70 sea lions were seen, and during September of 2001, no sea lions were present on the days before and after the launch.

Pacific Harbor Seals

Harbor seals live in the Pacific Ocean from Baja California in Mexico northward to the Aleutian Islands of Alaska. The population is not listed as ''endangered'' or ''threatened'' under the ESA; nor is this species listed as ''depleted'' or as a ''strategic stock'' under the MMPA. Harbor seals are primarily non-migratory and the seals around KLC are considered part of the Gulf of Alaska stock, which occurs from Cape Suckling to Unimak Pass, including animals throughout the Aleutian Islands. The most recent comprehensive aerial survey of harbor seals in Alaska were conducted in 1994 and 1996. When a correction factor is used to account for animals that were in the water during the counts, a minimum population estimate of this stock of harbor seals is 28,917 (Angliss and Lodge, 2004). The Kodiak Island population is estimated to have increased 7.2 percent annually from 1992–1996 (Angliss and Lodge, 2004) and survey data from 1992–2004 shows an even steeper increase at Ugak Island (Wynne, per. Comm., 2005), though numbers throughout the Gulf of Alaska are still lower than they were in the 1970s and 1980s.

Harbor seals are present on Ugak Island year round. They are found primarily on the east/south side of the island, backed by high, steep cliffs, but they also sometimes haul out on the north side of the island and on the rock croppings on the north and east sides of the island. Harbor seal pupping occurs on both Ugak between the middle of May and June. Yearly harbor seal counts at Ugak Island taken in August since 1992 show a steady increase from approximately 200 animals in 1992 to over 900 in 2004 (Wynne, pers. Comm., 2005). Surveys conducted in 1993 and 1994 found 88 and 96 harbor seal pups, respectively (AADC 1996).

Northern Fur Seals

The northern fur seal (*Callorhinus ursinus*) occurs offshore of the KLC site near the continental shelf break from January through April. Because of the distance from the launch site and the fact that they will be swimming through and not stopping (see Cetaceans, below), NMFS believes it unlikely that fur seals will be affected by the launch noise and they will not be addressed further.

Cetaceans

As noted, several species of cetaceans occupy the waters around KLC. However, airborne noise is generally reflected at the sea surface outside of a 26° cone extending down from an airborne source (Richardson *et al.*, 1995). Submerged animals would have to be directly under the noise sources before they could hear it, and, approximately 70 seconds after launch, a typical launch vehicle would be more than 8 miles (12.9 km) high. Underwater acoustic transmissions are complex, and affected by the level and frequency of noise, sea state and other surface conditions, and water depth. Given the

specific area, within a specific short time that a cetacean would need to be traveling through surface/or close to surface water to be exposed to rocket noise and the measured rocket sound levels and the attenuation that would occur before the noise reached deeper waters, NMFS believes it unlikely that any cetaceans will be impacted by the rocket noise.

Potential Effects of Rocket Launches on Marine Mammals

As outlined in several previous NMFS documents, the effects of noise on marine mammals are highly variable, and can be categorized as follows (based on Richardson *et al.*, 1995):

(1) The noise may be too weak to be heard at the location of the pinniped (i.e., lower than the prevailing ambient noise level, the hearing threshold of the animal at relevant frequencies, or both);

(2) The noise may be audible but not strong enough to elicit any overt behavioral response;

(3) The noise may elicit reactions of variable conspicuousness and variable relevance to the well being of the pinniped; these can range from temporary alert responses to active avoidance reactions such as stampedes into the sea from terrestrial haulout sites;

(4) Upon repeated exposure, pinnipeds may exhibit diminishing responsiveness (habituation), or disturbance effects may persist; the latter is most likely with sounds that are highly variable in characteristics, infrequent and unpredictable in occurrence (as are vehicle launches), and associated with situations that the pinniped perceives as a threat;

(5) Any anthropogenic noise that is strong enough to be heard has the potential to reduce (mask) the ability of pinnipeds to hear natural sounds at similar frequencies, including calls from conspecifics, and environmental sounds such as surf noise;

(6) If mammals remain in an area because it is important for feeding, breeding or some other biologically important purpose even though there is chronic exposure to noise, it is possible that there could be noise-induced physiological stress; this might (in turn) have negative effects on the well-being or reproduction of the animals involved; and

(7) Very strong sounds have the potential to cause temporary or permanent reduction in hearing sensitivity. In terrestrial mammals, and presumably marine mammals, received sound levels must far exceed the animal's hearing threshold for there to be any temporary threshold shift (TTS). For transient sounds, the sound level necessary to cause TTS is inversely related to the duration of the sound. Received sound levels must be even higher for there to be risk of permanent hearing impairment. In addition, intense acoustic or explosive events may cause trauma to tissues associated with organs vital for hearing, sound production, respiration, and other functions. This trauma may include minor to severe hemorrhage.

Solid rocket boosters from KLC launches will fall into the ocean away from any known or potential haul-out sites and do not pose any measurable threat to marine mammals. Launch noise is expected to occur over the coastal habitats of Narrow Cape and Ugak Island during every launch, while sonic booms will occur approximately 40 nm (74 km) downrange over open ocean, beyond the outer continental shelf, and are unlikely to affect marine mammals. Airborne launch sounds will mostly reflect or refract from the water surface and, except for sounds within a diameter of approximately 26 degrees directly below the launch vehicle, will not penetrate into the water column. The sounds that do penetrate will not persist in the water for more than a few seconds.

The primary sea lion haulout on Ugak Island is a spit facing KLC, and animals at this location would likely hear a rocket launch. Steller sea lions generally occupy this haulout from late summer to the early fall post-breeding period (late June to early October), historically by up to several hundred sea lions. Small numbers of harbor seals may haul out on the eastern end of the shoreline that extends from the spit. Harbor seals and, less frequently sea lions, also haul out on the southeast side of Ugak Island, but this area is sheltered from direct sight of and sound from KLC by a 300–ft (91.4–m) island cliff and, because it receives heavy surf, it already has high ambient noise levels. Because background ambient noise often interferes with or masks the ability of an animal to detect a sound even when that sound is above its absolute hearing threshold (Richardson *et al.*, 1995), it seems unlikely that animals hauled out at this location would hear noise associated with rocket launches from KLC.

Past Monitoring Results at KLC

ENRI was tasked under contract to the AADC to conduct environmental monitoring studies for rocket launches from KLC. In addition to collecting rocket noise data on the northern spit of Ugak Island, ENRI conducted aerial surveys over and collected real-time video footage at the seasonally occupied northern spit haulout site in conjunction with the three KLC launches when Steller sea lions might have been present at the haulout: *ait–1* on November 5, 1998; *ait*–2 on September 15, 1999; and Athena on September 29, 2001. The only time Steller sea lions were observed occupying the haulout was during the *ait*–2 launch monitoring period. Sixty to seventy animals were on the haulout about 5 hours pre-launch. Due to below freezing temperatures, the video system shut off about 4 hours prior to the *ait*–2 launch. The video data show Steller sea lions fighting or sleeping on the haulout, and then suddenly stampeding into the water and milling about immediately offshore. The cause of the stampede is not apparent in the video and no stimulus could be linked to the response (from the noise recordings or otherwise). When, or if, any of the Steller sea lions returned to the haulout before the *ait*–2 launch is unknown. Although sea lions may have returned to the rocks and fled the haulout again as a result of rocket noise, a clear-cut stimulus response of sea lion behavior to rocket noise cannot be postulated without video data from the time of the launch. Approximately 1 hour after the rocket was launched, no sea lions were seen hauled out and 50 to 60 sea lions were observed in the water immediately offshore. The day after the launch, 60 to 70 animals were seen hauled out at the same spot. Some of these animals could be the same ones that were flushed from the haulout the day before though they could also be different animals. Though sea lions have been shown to acclimate to disturbance from rocket launches at other spaceports (Thorson and Francine, 1999), it is unlikely that this is the case at KLC considering the infrequency of launches. Alternatively, approximately 280 harbor seals were seen at two locations on the east side of the island (next to the 300–ft (91–m) cliffs) during the aerial survey flown 5 hours pre-launch. During the one hour post-launch aerial overflight, the same number of harbor seals were hauled out at the same locations, which would suggest that they did not flush into the water, which would further suggest that the sound was blocked or masked by the high cliffs and high ambient noise on that side of the island. Though it is possible that the harbor seals were flushed into the water and then quickly hauled out again before the post-flight aerial survey, it seems unlikely considering that harbor seals are typically significantly more sensitive to

noise than sea lions and the sea lions were still in the water.

Unlike at the *ait*–2 launch discussed above, no Steller sea lions were present at the Ugak Island haulout during the ait–1 and Athena launches and it was not possible to relate any behavioral responses to the recorded noise levels. Harbor seals were present at the other two launches, but monitoring was not required and the surveys were not conducted immediately before and after the launch and could not establish a stimulus response to the rocket launch. For all launches, however, launch noises recorded at the haulout site were within the audible ranges of pinnipeds (Richardson *et al.*, 1995) and both Steller sea lions and harbor seals would have heard them had they been present. Further, recorded sound pressures were at, and sometimes above, levels known to occasionally induce startle responses in pinnipeds (Richardson *et al.*, 1995). Rocket launches will present Steller sea lions and harbor seals with novel visual and possibly tactile stimuli as well as unusually loud sounds and bright lights from the burning rocket and white exhaust flume.

Steller Sea Lions

The behavioral data record for Steller sea lions is small throughout the North Pacific range and typically is focused on reproductive behaviors. In general, studies have shown that responses of pinnipeds on beaches to acoustic disturbance arising from rocket and target missile launches are highly variable. This variability may be due to many factors, including species, age class, and time of year. Porter (1997) observed Steller sea lions fleeing into the water for a wide variety of reasons such as helicopter overflights, bird flybys, and the presence of nearby humans. He also noted sea lions stampedes into the water that could not be correlated with any observed stimulus. There is also evidence that both time of day and temperature alter the probability of entry into the water (animals are more likely to enter the water when already overheated) (Bowles, 2000). Steller sea lions have been seen to mill about just offshore with their heads up in a heightened state of watchfulness (Porter, 1997) and remain close to the haulout until they sense it is safe to go back ashore (Lockheed Martin Environmental Services, 1999).

Noise generated from aircraft and helicopter activities associated with the launches may provide a potential secondary source of incidental harassment, and the physical presence of aircraft or biologists could also lead to non-acoustic effects on marine mammals involving visual or other cues. However, other disturbance-related data collected during the *ait*–2 study (ENRI, 2000) does not fit well with stimulus response data from other sources. Sea lions are widely thought to be intolerant of helicopter noise (Porter, 1997), yet the animals in question did not appear to respond to multiple exposures of more intense helicopter noise at Ugak Island than that from the rocket (ENRI, 2000). They are also thought to be intolerant of humans on foot, yet a video from the *ait*–2 study shows hauled-out sea lions on Ugak Island undisturbed by biologists actively engaged in work within 328 ft (100 m) of them. The Ugak Island haulout is also regularly exposed to disturbances from aircraft and fishing vessels transiting Narrow Strait.

Recent studies (Lawson *et al.*, 2002, and NAWS, 2002) suggest that Level B harassment, as evidenced by beach flushing, will sometimes occur upon exposure to launch sounds with ASEL's of 100 dBA (re 20 micro-Pa^2 -sec) or higher. It is expected that most received noise levels at Ugak Island would be at levels which are likely to cause a temporary disturbance. The infrequent (up to nine times per year) and brief (no more than one minute as heard from Ugak Island) nature of these sounds that would result from a rocket launch would cause masking for not more than a very small fraction of the time during any single launch day and it is unlikely that pinnipeds will become habituated to launch sounds. In addition, the extremely rapid departure of the rockets means that pinnipeds would be exposed to increased sound levels for very short time intervals, and because launches are conducted relatively infrequently, neither physiological stress nor hearing related injuries are likely. Therefore, NMFS anticipates that the effects of rocket launches from KLC would have no significant effects on the abilities of sea lions to hear one another or to detect natural environmental sounds, and would have no more than a negligible impact on Steller sea lion populations.

Harbor Seals

An ongoing scientific research program has been conducted since 1997 to determine the long-term cumulative impacts of space vehicle launches on the haul-out behavior, population dynamics and hearing acuity of harbor seals at Vandenberg Air Force Base (VAFB) in California. The response of harbor seals to rocket launch noise depended on the intensity of the noise (dependent on the size of the vehicle and its proximity) and the age of the seal. The percentage of seals leaving the haul-out increases with noise level up to approximately 100 dB ASEL, after which almost all seals leave, although recent data has shown that an increasing percentage of seals have remained on shore, and those that remain are adults (Thorson *et al.*, 1999). Given the high degree of site fidelity among harbor seals, it is likely that those seals that remained on the haul-out site during rocket launches had previously been exposed to launches; that is, it is possible that adult seals have become acclimated to the launch noise and react differently than the younger inexperienced seals. The louder the launch noise, the longer it took for seals to begin returning to the haulout site and for the numbers to return to pre-launch levels. In two past Athena IKONOS launches with ASELs of 107.3 and 107.8 dB at the closest haulout site, seals began to haulout again approximately 16–55 minutes post-launch (Thorson *et al.*, 1999). In contrast, noise levels from an Atlas launch and several Titan II launches had ASELs ranging from 86.7 to 95.7 dB at the closest haulout, and seals began to return to the haulout within 2–8 minutes post-launch. Seals returned to the haulouts within 2 to 55 minutes of the launch disturbance, and the haulout usually returned to pre-launch levels within 45 to 120 minutes.

In addition to behavioral disturbance, loud sounds may also cause TTS, which is a slight, recoverable loss of hearing. In order to further determine if harbor seals experience any change in their hearing sensitivity as a result of launch noise, researchers conducted Auditory Brainstem Response (ABR) testing on 10 harbor seals prior to, and after, the launches of 3 Titan IV rockets (one of the loudest launch vehicles at the south VAFB haul-out site). Detailed analysis of the changes in waveform latency and waveform replication of the ABR measurements showed that there were no detectable changes in the seals' hearing sensitivity as a result of the launch noise (SRS Technologies, 2001).

The launches at VAFB do not appear to have had long-term effects on the harbor seal population in this area. The total population of harbor seals at VAFB is estimated to be 1,040 animals and has been increasing at an annual rate of 12.6 percent. Since 1997, there have been 5 to 7 space vehicle launches per year and there appears to be only short-term disturbance effects to harbor seals as a result of launch noise (SRS Technologies, 2001). Harbor seals will temporarily leave their haul-out when exposed to launch noise; however they generally return to the haul-out within one hour.

Harbor seals use Ugak Island as a pupping site. Though no launches have as yet taken place during the pupping period at Ugak Island (late May through mid-June), they may at some point in the future. There has been little systematic study of the reactions of pinnipeds to rocket launches or aircraft overflights during pupping periods. Pinnipeds hauled out for pupping or molting are generally the most responsive to aircraft overflights (Richardson *et al.*, 1995). Harbor seals often leave beaches when aircraft fly over and then sometimes haulout at a different site afterwards, which results in permanent separation if pups are unable to follow their mothers into the water. Additionally, very young pups that are pushed into the water as the adults flush may subsequently drown. One study showed more than 10 percent of approximately 2000 pups born on one Alaskan island died as a result of disturbance from low-flying aircraft (Richardson *et al.*, 1995). The same study found that aircraft were more disturbing on calm days, when at low altitudes, and after recent disturbances. Since harbor seals have been shown to flush into the water in response to rocket launch noise of a level similar to that occurring at Ugak Island, one can infer that separation of pups from their mothers could occur if the launch occurred during a pupping period and the harbor seals were using the north side of the island to pup on.

Rocket launches at KLC have associated security overflights that occur an approximate total of 5 to 10 times per day in the days preceding and following the launch. Several studies of both harbor seals and Steller sea lions cited in Richardson *et al.*, 2005, suggest that these animals respond significantly less to overflights of both planes and helicopters that occur above 305 m (0.2 mi). One mitigation requirement included in the rule is that security overflights immediately associated with the launch will not approach occupied pinniped haulouts on Ugak Island by closer than 0.25 mile (0.4 km), and will maintain a vertical distance of 1000 ft (305 m) from the haulouts when within 0.5 miles (0.8 km), unless indications of human presence or activity warrant closer inspection of the area to assure that national security interests are protected in accord with law. Monitoring flights will not approach closer than 0.25 (0.4 km) mile from the island. It is unlikely that either of these overflights will add noticeably to any harassment of pinnipeds surrounding the rocket launches.

Harbor seals primarily use the east side of Ugak Island, though they sometimes use the north side of the island both for hauling out and for pupping. For several reasons, NMFS believes that the seals using the east side of the island are not likely to be harassed by rocket launch noise: the eastern shoreline faces away from the point the rocket noise is emanating from and is backed up by a 300–500–ft (91.4–152.4 km) cliff; the rough seas hitting rocks make the ambient noise very loud on the eastern shoreline; and data collected during the *ait*–2 launch showed that one hour after the launch, when sea lions were swimming immediately off the rocks on the north shore, the harbor seals were still hauled out in the same numbers and at the same locations that they were 5 hours before the launch. NMFS believes that harbor seals hauled out on the north beach may be temporarily behaviorally disturbed and possibly temporarily displaced from their haulouts immediately following rocket launches. If launches occur during the harbor seal pupping period and harbor seals have also chosen to pup on the north beach, it is possible that harbor seal pups could die as a result of the adults flushing in response to the rocket noise. NMFS believes that the proposed action may result in the temporary behavioral disturbance and, less likely, mortality (pups only) of small numbers, in relation to the population numbers (see next section), of harbor seals. NMFS anticipates that these impacts will have no more than a negligible effect on the species stock.

Numbers of Marine Mammals Expected to be Taken by Harassment

The highest number of Steller sea lions seen at one time on Ugak Island since 1993 is approximately 375 (1997). However, based on both dedicated and opportunistic surveys by one researcher, approximately 160 were seen in 1999 and numbers have decreased since then (Wynne, pers. comm., 2005). Approximately 50 were seen in 2001 and numbers have further decreased since then. Steller sea lions seasonally use the Ugak island sites (the northern spit, and occasionally the southwest tip) as haulout sites from late June to early October. While not logistically optimal for the applicant, the fastest that KLC can prepare the facilities for a new launch right after a launch is 4 weeks, which means that at most it would be logistically possible to have four launches a year within the time that the sea lions are using Ugak Island as a haulout. Based on the maximum number seen and the sea lion trend over the last several years, NMFS anticipates that the most sea lions likely to be harassed during one launch is 300. This translates to the potential harassment of 1,200 Steller sea lions in one year (assuming different individual sea lions are harassed each launch). However a mitigation measure is required that will limit the number of launches within the time that sea lions are present to three, which lowers the number of potential harassments to 900 animals annually. This is a small number relative to the affected stock.

Harbor seal numbers have steadily increased at Ugak Island since 1992, and just over 900 were counted during the molt in 2004 (Wynne, pers. comm., 2005). The last pupping season counts showed 290 adults and 88 pups in 1993, and 292 adults and 96 pups in 1994. According to local researchers, the primary haulout for harbor seals is on the east side of the island (where NMFS does not believe there are likely to be any effects from the rocket launch noise) and the majority of the seals may be found there. In three days of her 1994 survey, Wynne (2005) found that an average of approximately 25 percent of both adults and pups were hauled out on the north side of the beach. Therefore, NMFS estimates that of a maximum of 900 harbor seals present during any launch, 275 of them may be located on the north side of the island and exposed to the rocket launch noise. Harbor seals are present at Ugak all year, which means that if there were nine launches in one year, a maximum of 2,475 harbor seals could be exposed to the noise and potentially harassed in one year (assuming different individuals were present each launch, else the number is smaller, but some may be harassed more than one time). The harbor seal pupping season runs from mid-May through June. Since it takes a minimum of 4 weeks to prepare for a new launch, it would be logistically possible to have two launches during that time. The highest number of pups seen at Ugak was 96 in 1994. Though numbers of pups have probably increased with the numbers of adults since 1994 (by a factor of three), only a minority of pups (estimated one fourth) will likely be present on the north side of the island and exposed to the noise and potential flushing of adults. One scientist reported that more than 10 percent of 2000 harbor seal pups died on an Alaskan Island following disturbance from exposures to low flying aircrafts (Richardson et al., 1995). NMFS estimates that if 72 pups (highest number seen (in 1996) multiplied by three for population increase and divided by four to account for number exposed on north side of island) were

twice exposed to rocket noise sufficient to flush the adults, up to 20 harbor seal pups (15 percent) might die. However, one required mitigation measure limits AADC to one launch during the pupping season, which lowers the potential mortality of harbor seal pups to 11 annually (55 over the life of the regulations). NMFS believes that a small number (no more than 2,488) of harbor seals may be affected relative to the population estimates.

Effects of Rocket Launches on Subsistence Needs

There are no subsistence uses of pinniped species in Alaska waters within the KLC primary study area, and, therefore, NMFS anticipates no effects on subsistence needs.

Effects of Rocket Launches on Marine Mammal Habitat

Solid rocket boosters would fall into the ocean away from any known or potential haulouts and the chances of a cetacean being in the wrong place at the wrong time are discountable. All sonic booms that reach the earth's surface would be expected to be over open ocean beyond the outer continental shelf. Airborne launch sounds would mostly reflect or refract from the water surface and, except for sounds within a diameter of approximately 26 degrees directly below the launch vehicle, would not penetrate into the water column. The sounds that do penetrate would not persist in the water for more than a few seconds. Overall, rocket launch activities from KLC would not be expected to cause any impacts to habitats used by marine mammals, including pinniped haulouts, or to their food sources.

Mitigation

Under Section 101(a)(5) of the MMPA, adverse impacts are to be reduced to the lowest level practicable. Due to the nature of the rocket launches and the pinnipeds responses, the most obvious way to mitigate for the effects of the rocket launch noise is to minimize the number of launches that the Steller sea lions and harbor seals are exposed to. This sort of mitigation is logistically difficult and impracticable for AADC, as their launch operations are driven by the needs of the agencies and companies that utilize their facilities. However, NMFS and the applicant have worked out a way to reduce the potential Level B Harassment of sea lions by 25 percent and to reduce the potential Level A Harassment or mortality of harbor seal pups by 50 percent.

In their application, AADC asked for authorization to take marine mammals during nine rocket launches annually. The quickest that the launch pad can be turned around for another launch is four weeks. This means that it would be logistically possible to launch 4 rockets during the season that the Steller sea lions are using Ugak Island, and logistically possible to launch two rockets during the harbor seal pupping season. As a mitigation measure, NMFS has incorporated into the rule and LOAs a requirement that not more than an average of three launches per year could occur within the sea lion season, and not more than an average of one launch per year could occur during the harbor seal pupping season. Therefore, no more than 15 launches would occur within the sea lion season (June 15 - September 30) over the course of the 5–year rule, and no more than 5 launches would occur during the harbor seal pupping season (May 15 - June 30) over the course of the 5–year rule.

Even though the video monitoring of Steller sea lions at Ugak Island indicates they did not flush in response to helicopter or noise recorded during the same time period, the scientific literature shows that pinnipeds will often have an adverse response to low-flying aircraft. AADC typically flies several security overflights in conjunction with a rocket launch. As a result, NMFS has incorporated a mitigation measure wherein the security flights immediately associated with rocket launches would not approach closer than 0.25 mile (0.4 km) to occupied pinniped haulout sites or fly lower than 1000 ft (305 m) when the plane is closer than 0.5 miles (0.8 km) from occupied pinniped sites on Ugak Island unless indications of human presence or activity warrant closer inspection of the area to assure that national security interests are protected in accord with law.

Monitoring

Marine Mammal Monitoring

The objective of monitoring Steller sea lions and Pacific harbor seals is to detect any indications of pinniped disturbance, injury, or mortality that results from KLC rocket launches at the Ugak Island haulout site. Monitoring would be conducted on Ugak Island for launches that take place between June 15 and September 30, an observation period that includes the seasonal occupation of the Steller sea lions as well as the molting period of the harbor seals (when their numbers are higher and their responses to disturbance potentially greater). Launches occurring during the harbor seal pupping season (May 15 – June 30) would also be monitored. All haulout areas on Ugak Island would be monitored before, during, and after launch operations to document and characterize any observed responses. Monitoring would be designed to determine the type of reactions (or injury or mortality) and their relationship to noises associated with rocket launches. Fixed-wing aerial surveys would be flown for any launches taking place from June 15 through September 30 using a minimum flight altitude of 156 m (500 ft) above sea level (ASL) to be flown at low tide or, with consultation, toward evening. The aircraft would come no closer than 0.25 miles (0.4 km) to the haulout. Depending on aircraft availability, one or two NMFS-approved biologist observers would accompany the pilot. Data will be gathered both visually and with a camera having a zoom lens. A total of five surveys would be flown, if weather conditions permit. The first would occur the day prior to a scheduled launch and the second as soon after the launch as possible. Replicate surveys will be flown the following three successive days to determine post-launch haulout-use patterns.

For any launches that occur from June 15 through September 30, a real-time video record will be made of sea lion reactions to launch-related noises. This will be accomplished by the installation of a remote custom-designed, closed-circuit, weatherproof, time-lapse video camera system at the base of the Ugak Island sea lion haulout before a launch, which will be retrieved post-launch. Results of the aerial and video surveys will be compared, providing information on startle effects and durations. In addition, video data will be time-correlated with rocket motor noise measurements to provide objective information on any startle responses or indications of disturbance reactions that may occur resulting from rocket launches. Comparisons will also be made with baseline data assembled by AADC to help gauge any natural trends that may be occurring.

The majority of harbor seals haul out on the eastern side of Ugak Island, which is completely inaccessible to pedestrian or boat traffic due to the high cliffs and violent surf, so it is not possible to set up video recorders there. However, approximately 25 percent of the harbor seals haul out on the eastern end of the north-facing shore of Ugak Island. Though it has not yet been attempted, it may be possible to set up a camera with a zoom lens on the accessible western end of the north-facing shore to record harbor seal behavior on the middle or eastern end

of the shore, or on the rocks off shore. At some time prior to the first launch that occurs between May 15 and June 30, when harbor seals are present (perhaps immediately before or after the camera has already been set up to record sea lions), AADC will test the efficacy of using the camera on the harbor seal haulout and report their findings to NMFS. If successful, the same real-time video and acoustic measurements (see below) will be conducted when launches occur during the harbor seal pupping season as occur when the sea lions are present.

NMFS believes it unlikely that the security overflights immediately preceding and following the rocket launches would result in the harassment of marine mammals. However, when pinnipeds are present at haulouts during security overflights associated with rocket launches, a member of the flight crew will note and record whether pinnipeds appeared to flush as a result of the overflight and estimate a number.

Acoustic Measurements

Rocket motor noise monitoring would be done concurrently with video monitoring at the Ugak Island haulouts. These data will be synchronized to the video data to document correlations between noise signatures and pinniped responses. Sound intensity and frequency metrics will be recorded before, during, and after a launch by an SLM mounted on a permanent stanchion upon the Ugak Island haulout one day or more before a launch and retrieved within one day post-launch. The SLM will be set to highlight sounds greater than 70 dBA.

Reporting

In the event that any cases of pinniped injury or mortality are judged to result from launch activities at any time during the period covered by these regulations, this event will be reported to NMFS immediately.

Data from monitoring activities would be analyzed, summarized, and reported to NMFS within 90 calendar days following cessation of field activities for each launch. The report would include the timing and nature (vehicle type, azimuth, measured sound data) of launch operations as well as the times of the monitoring flights. The report would include sea lion and harbor seal counts (separated into adult and pup), as well as observations of any other marine mammals seen during monitoring or security overflights. The report will summarize behavioral observations in relation to recorded, or other known, stimuli (launches or aircraft), and estimate the number of the affected animals and the nature of their reactions. The report will include a summary of the acoustic measurements. The report will include a copy of all videotapes containing sea lion and harbor seal footage, and selected illustrative 35mm pictures, cross-referenced to the appropriate launches and acoustic measurements. AADC would also include this information in its Annual Environmental Monitoring and Natural Resources Management Report.

An interim technical report is proposed to be submitted to NMFS 60 days prior to the expiration of each annual LOA issued under these regulations, along with any request for a subsequent annual LOA. This interim technical report would provide full documentation of methods, results, and interpretation pertaining to all monitoring tasks for launches during the period covered by the LOA. NMFS recognizes that only preliminary information would be available for any launches during the 60–day period immediately preceding the expiration of the LOA.

In addition to annual interim technical reports, NMFS is requiring AADC to submit a draft comprehensive technical report to NMFS 180 days prior to the expiration of the regulations. This draft technical report would provide full documentation of methods, results, and interpretation of all monitoring tasks for launches during the first four LOA's, plus preliminary information for launches during the first 6 months of the final LOA. AADC will incorporate NMFS recommendations on the draft report and submit a final comprehensive technical report within 60 days of the expiration of the regulations.

National Environmental Policy Act (NEPA)

The FAA prepared an Environmental Assessment (EA) and subsequently issued a Finding of No Significant Impact (FONSI) for AADC's proposal to construct and operate a launch site at Narrow Cape on Kodiak Island, Alaska. Since 1998, AADC has provided monitoring reports related to noise and marine mammal impacts associated with ongoing rocket launches from KLC. After reviewing the new information contained in the monitoring reports and considering the MMC's comments that impacts to harbor seals should be more comprehensively addressed, NMFS decided that a more current environmental analysis was necessary. In 2005, NMFS prepared an EA on the Promulgation of Regulations Authorizing Take of Marine Mammals Incidental to Rocket Launches at Kodiak Launch Complex, Alaska, and the Issuance of Subsequent Letters of Authorization. NMFS found that the promulgation of a 5–yr Rule and issuance of LOAs will not significantly impact the quality of the human environment and issued a Finding of No Significant Impact (FONSI). Accordingly, preparation of an Environmental Impact Statement or Supplemental Environmental Impact Statement for this action was not necessary.

Endangered Species Act (ESA)

The endangered Steller sea lion is the only federally listed marine mammal under NMFS' jurisdiction that is likely to be adversely affected by the proposed action. Ugak Island also contains designated critical habitat for the Steller sea lion. The FAA and NMFS have consulted with the Endangered Species Division of the NMFS Alaska Region. A Biological Opinion (BO) issued in November, 2003 found that the proposed action is not likely to jeopardize the continued existence of listed species nor result in the destruction or adverse modification of critical habitat.

The northern sea otter, federally listed as threatened under the ESA, may be found in the KLC area throughout the year. The northern sea otter is within the jurisdiction of the USFWS, which is responsible for issuing authorizations and incidental take statements for takes of this species. AADC is currently in consultation with USFWS regarding the sea otter.

Steller's eider, federally listed threatened and under the jurisdiction of the USFWS, is found in the vicinity of the KLC. Following several years of recommended monitoring of both Steller's eiders and bald eagles (not federally listed in Alaska), the USFWS concurred with AADC's conclusion that the rocket launches at AADC have no effect on either of these species.

Classification

This action has been determined to be not significant for purposes of Executive Order 12866.

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration at the proposed rule stage that this rule would not have a significant economic impact on a substantial number of small entities. The rule would apply only to AADC, and would have no effect, directly or indirectly, on small businesses. The rule may affect a small number of contractors providing services related to reporting the impact

of the activity on marine mammals, some of whom may be small businesses, but the number involved would not be substantial. Because of this certification, a regulatory flexibility analysis is not required, and none was prepared. No comments concerning this certification were prepared.

Notwithstanding any other provision of law, no person is required to respond to nor shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act (PRA) unless that collection of information displays a currently valid Office of Management and Budget (OMB) control number. This proposed rule contains collection-of-information requirements subject to the provisions of the PRA. This collection has been approved previously by OMB under section 3504(b) of the PRA issued under OMB control number 0648–0151, and includes applications for LOAs and reports.

List of Subjects in 50 CFR Part 216

Exports, Fish, Imports, Indians, Labeling, Marine mammals, Penalties, Reporting and record keeping requirements, Seafood, Transportation.

■ For reasons set forth in the preamble, 50 CFR part 216 is amended as follows:

PART 216—REGULATIONS GOVERNING THE TAKING AND IMPORTING OF MARINE MAMMALS

■ 1. The authority citation for part 216 continues to read as follows:

Authority: 16 U.S.C. 1361 *et seq.*

■ 2. Subparts R, S, and T are added and reserved.

■ 3. Subpart U is added to read as follows:

Subpart U—Taking of Marine Mammals Incidental to Rocket Launches from the Kodiak Launch Complex, Kodiak Island, AK

Sec.

Subpart U—Taking of Marine Mammals Incidental to Rocket Launches from the Kodiak Launch Complex, Kodiak Island, AK

§ 216.230 Specified activity and specified geographical region.

(a) Regulations in this subpart apply only to the incidental taking of marine mammals specified in paragraph (b) of this section by U.S. citizens engaged in rocket launch activities (up to nine launches per year) at the Kodiak Launch Complex on Kodiak Island, Alaska.

(b) The incidental take of marine mammals under the activity identified in paragraph (a) of this section is limited to Steller sea lions (*Eumetopius jubatus*) and Pacific harbor seals (*Phoca vitulina richardsi*).

§ 216.231 Effective dates.

Regulations in this subpart are effective from February 27, 2006 through February 28, 2011.

§ 216.232 Permissible methods of taking.

(a) Under a Letter of Authorization issued pursuant to § 216.106, the Alaska Aerospace Development Corporation and its contractors, may incidentally, but not intentionally, take Steller sea lions by Level B harassment, take adult Pacific harbor seals by Level B harassment, and take harbor seal pups by Level B or Level A harassment or mortality, in the course of conducting missile launch activities within the area described in § 216.230(a), provided all terms, conditions, and requirements of these regulations and such Letter of Authorization are complied with.

(b) The activities identified in § 216.230(a) must be conducted in a manner that minimizes, to the greatest extent practicable, adverse impacts on marine mammals and their habitat.

§ 216.233 Prohibitions.

The following activities are prohibited:

(a) The taking of a marine mammal that is other than unintentional.

(b) The violation of, or failure to comply with, the terms, conditions, and requirements of this subpart or a Letter of Authorization issued under § 216.106.

(c) The incidental taking of any marine mammal of a species not specified, or in a manner not authorized, in this subpart.

§ 216.234 Mitigation, monitoring and reporting.

(a) No more than five launches may occur between May 15 and June 30 within the 5–year period, and no more than 15 launches may occur between June 15 and September 30 within the 5–year period.

(b) The holder of the Letter of Authorization must implement the following measures for all launches occurring from June through October:

(1) Conduct five replicate fixed-wing aerial surveys of all hauled out Steller sea lions and harbor seals at Ugak Island, each flown at low tide (weather permitting), using a minimum flight altitude of 500 feet (152 meters) above sea level, with an approach no closer than 0.25 mi (0.40 km) to the haulout, and conducted a day prior to, directly following, and for three consecutive days after a launch.

(2) At least one biologist observer will accompany the pilot during all aerial surveys.

(3) Data gathered during aerial surveys will be gathered visually and through the use of a camera with a zoom lens.

(4) A real-time video record of Steller sea lion reactions to launch noise will be made using a video camera system placed upon the Ugak Island haulout before a scheduled launch and then retrieved after the launch.

(5) Sound intensities and frequencies of rocket motor noise will be recorded before, during, and after a launch by a sound level monitor mounted upon the Ugak Island haulout and set to highlight sounds greater than 70 dBA. Monitors will be installed one day or more before a launch and retrieved within one day post-launch.

(c) A trial effort to obtain real-time video records of harbor seals hauled out at the eastern end of the northern side of the island and their reactions to launch noise will be made as soon as practicable. A brief report summarizing the efficacy of this monitoring effort should be included in the standard monitoring reports for that launch and year. If valuable data may be gathered using this method, real-time video records of harbor seals reactions to launch noise will be made before launches scheduled between May 15 and June 30, and between June 30 and September 30 if the equipment is not being used to record Steller sea lions, and then retrieved after the launches.

(d) Security flights immediately associated with rocket launches may not approach closer than 0.25 mile (0.4 km) to occupied pinniped haulout sites on Ugak Island or fly lower than 1000 ft (305 m) when the plane is closer than 0.5 miles (0.8 km) from occupied pinniped sites on Ugak Island unless indications of human presence or activity warrant closer inspection of the area to assure that national security

interests are protected in accordance with the law.

(e) When pinnipeds are present at haulouts during security overflights associated with rocket launches, and when practicable, a member of the flight crew will note and record whether pinnipeds appeared to flush as a result of the overflight and estimate a number.

(f) The holder of the Letter of Authorization is required to cooperate with the National Marine Fisheries Service and any other Federal, state or local agency monitoring the impacts of the activity on marine mammals. The holder must notify the NMFS Alaska Assistant Regional Administrator for Protected Resources and to the NMFS Division of Permits, Conservation, and Education, Office of Protected Resources at least 2 weeks prior to commencing monitoring activities.

(g) Activities related to the monitoring described in paragraph (a) of this section or in the Letter of Authorization may be conducted without a separate scientific research permit.

(h) In coordination and compliance with the Alaska Aerospace Development Corporation, the National Marine Fisheries Service may place an observer on Kodiak or Ugak Islands for any marine mammal monitoring activity prior to, during, or after a missile launch to monitor impacts on marine mammals, provided observers are not within the calculated danger zone of the rocket's flight path during a launch.

(i) The holder of the Letter of Authorization must comply with any other applicable state or federal permits, regulations, and environmental monitoring agreements set up with other agencies.

(j) The National Marine Fisheries Service must be informed immediately of any proposed changes or deletions to any portions of the monitoring requirements.

(k) The holder of the Letter of Authorization must implement the following reporting requirements:

(1) If indications of injurious or lethal take are recorded, the NMFS Alaska Assistant Regional Administrator for Protected Resources and the NMFS Division of Permits, Conservation, and Education, Office of Protected Resources, or their designees, will be contacted within 48 hours. In consultation with the National Marine Fisheries Service, launch procedure, mitigation measures, and monitoring methods must be reviewed and appropriate changes made prior to the next launch.

(2) Data from monitoring activities will be reported to the National Marine Fisheries Service within 90 days following cessation of field activities for each launch. After the trial effort to videotape harbor seals at the eastern end of the north side of Ugak island, a summary of the effectiveness of the videotaping will be included in the associated launch report.

(3) An interim technical report must be submitted to the NMFS Alaska Assistant Regional Administrator for Protected Resources and to the NMFS Division of Permits, Conservation, and Education, Office of Protected Resources at least 60 days prior to the expiration of each annual Letter of Authorization. This report must contain the following information:

(i) Timing and nature of launch operations and monitoring flights;

(ii) A summary of marine mammal behavioral observations in relation to recorded acoustic stimuli and other known visual or audio stimuli;

(iii) An estimate of the amount and nature of all takes.

(iv) A copy of all videotapes containing sea lion and harbor seal footage, and selected illustrative 35 mm or digital pictures, cross-referenced to the appropriate launches and acoustic measurements.

(4) A draft comprehensive technical report will be submitted to the NMFS Alaska Assistant Regional Administrator for Protected Resources and to the NMFS Division of Permits, Conservation, and Education, Office of Protected Resources, 180 days prior to the expiration of these regulations with full documentation of the methods, results, and interpretation of all monitoring tasks for launches during all expired Letters of Authorization, plus preliminary information for launches during the first 6 months of the final Letter of Authorization.

(5) A revised final comprehensive technical report, including all monitoring results during the entire period of the Letter of Authorization, will be due 90 days after the end of the period of effectiveness of these regulations.

(6) The interim and draft comprehensive technical reports will be subject to review and comment by the National Marine Fisheries Service. Any recommendations made by the National Marine Fisheries Service must be addressed in the final comprehensive technical report prior to acceptance by the National Marine Fisheries Service.

§ 216.235 Letter of Authorization.

(a) A Letter of Authorization, unless suspended or revoked, will be valid for a period of time specified in the Letter of Authorization, but a Letter of Authorization may not be valid beyond the effective period of the regulations.

(b) A Letter of Authorization will set forth:

(1) Species of marine mammals authorized to be taken;

(2) Permissible methods of incidental taking;

(3) Specified geographical region;

(4) Means of effecting the least practicable adverse impact on the species of marine mammals authorized for taking and its habitat; and

(5) Requirements for monitoring and reporting incidental takes.

(c) Issuance of a Letter of Authorization will be based on a determination that the number of marine mammals taken by the activity will be small, and that the total taking by the activity as a whole will have no more than a negligible impact on the affected species or stocks of marine mammal(s).

(d) Notice of issuance or denial of a Letter of Authorization will be published in the **Federal Register** within 30 days of a determination.

§ 216.236 Renewal of a Letter of Authorization.

(a) A Letter of Authorization for the activity identified in § 216.230(a) will be renewed upon:

(1) Notification to the National Marine Fisheries Service that the activity described in the application for a Letter of Authorization submitted under § 216.235 will be undertaken and that there will not be a substantial modification to the described activity, mitigation or monitoring undertaken during the upcoming season;

(2) Timely receipt of and acceptance by the National Marine Fisheries Service of the monitoring reports required under § 216.234;

(3) A determination by the National Marine Fisheries Service that the mitigation, monitoring and reporting measures required under §§ 216.232 and 216.234 and the Letter of Authorization were undertaken and will be undertaken during the upcoming period of validity of a renewed Letter of Authorization; and

(4) A determination that the number of marine mammals taken by the activity will be small and that the total taking by the activity will have no more than a negligible impact on the affected species or stocks of marine mammal(s), and that the level of taking will be consistent with the findings made for the total taking allowable under these regulations.

(b) A notice of issuance or denial of a renewal of a Letter of Authorization will be published in the **Federal**

Register within 30 days of a determination.

§ 216.237 Modifications to a Letter of Authorization.

(a) Except as provided in paragraph (b) of this section, no substantive modification (including withdrawal or suspension) to a Letter of Authorization issued pursuant to the provisions of this subpart shall be made by the National Marine Fisheries Service until after notification and an opportunity for public comment has been provided. A renewal of a Letter of Authorization under § 216.236 without modification is not considered a substantive modification.

(b) If the Assistant Administrator determines that an emergency exists that poses a significant risk to the well-being of the species or stocks of marine mammals specified in § 216.230(b), a Letter of Authorization may be substantively modified without prior notification and an opportunity for public comment. Notification will be published in the **Federal Register** within 30 days of the action.

Dated: January 19, 2006.

John Oliver,

Deputy Assistant Administrator for Operations, National Marine Fisheries Service.

[FR Doc. 06–765 Filed 1–25–06; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 635

[I.D. 011906B]

Atlantic Highly Migratory Species; Atlantic Bluefin Tuna Fisheries

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Temporary rule; inseason retention limit adjustment.

SUMMARY: NMFS has determined that the Atlantic bluefin tuna (BFT) General category daily retention limit for the final three restricted fishing days (RFD) should be adjusted. These General category RFDs are being waived to provide reasonable opportunity for utilization of the coastwide General category BFT quota. Therefore, NMFS waives the final three RFDs scheduled for January 2006, and increases the daily retention limit from zero to two large medium or giant BFT on these previously designated RFDs.

DATES: Effective dates for BFT daily retention limits are provided in Table 1 under **SUPPLEMENTARY INFORMATION**.

FOR FURTHER INFORMATION CONTACT: Brad McHale, 978–281–9260.

SUPPLEMENTARY INFORMATION: Regulations implemented under the authority of the Atlantic Tunas Convention Act (16 U.S.C. 971 *et seq.*) and the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act; 16 U.S.C. 1801 *et seq.*) governing the harvest of BFT by persons and vessels subject to U.S. jurisdiction are found at 50 CFR part 635. The 2005 General category BFT fishing season began on June 1, 2005, and ends January 31, 2006. The final initial 2005 BFT specifications and General category effort controls (June 7, 2005; 70 FR 33033) established the following RFD schedule for the 2005 fishing year: All Fridays, Saturdays, and Sundays from November 18, 2005, through January 31, 2006, and Thursday, November 24, 2005, inclusive, provided quota remained available and the fishery was open. RFDs are intended to extend the General category BFT fishery late into the southern Atlantic season. NMFS has determined that the BFT General category daily retention limit for the final three RFDs should be adjusted as described in Table 1 to provide reasonable opportunity to utilize the coastwide General category BFT quota.

TABLE 1.—EFFECTIVE DATES FOR RETENTION LIMIT ADJUSTMENTS

Permit Category	Effective Dates	Area	BFT Size Class Limit
Atlantic tunas General and HMS Charter/ Headboat (while fishing commercially).	January 27, 28, and 29, 2006.	All	Two BFT per vessel per day/trip, measuring 73 inches (185 cm) CFL or larger.

Adjustment of General Category Daily Retention Limits

Under 50 CFR 635.23(a)(4), NMFS may increase or decrease the General category daily retention limit of large medium and giant BFT over a range from zero (on RFDs) to a maximum of three per vessel to allow for maximum utilization of the quota for BFT. NMFS has taken multiple actions during the 2005 fishing year in an attempt to allow for maximum utilization of the General category BFT quota. On September 28, 2005 (70 FR 56595), NMFS adjusted the commercial daily BFT retention limit (on non-RFDs), in all areas, for those vessels fishing under the General category quota, to two large medium or giant BFT, measuring 73 inches (185 cm) or greater curved fork length (CFL), per vessel per day/trip, effective through January 31, 2006, inclusive, provided quota remained available and the fishery remained open. On November 9, 2005 (70 FR 67929), NMFS waived the previously designated RFDs for the month of November; on December 16, 2005 (70 FR 74712), NMFS waived designated RFDs for December 16–18, inclusive; on January 4, 2006 (71 FR 273), NMFS waived designated RFDs for December 31, 2005, and January 1, 2006, inclusive; on January 9, 2006 (71 FR 1395), NMFS waived RFDs for January 7, 8, 13, 14, and 15, 2006; and on January 20, 2006 (71 FR 3245), NMFS waived the designated RFDs for January 20, 21, and 22, 2006. The daily retention limit for all the above dates was adjusted to two large medium or giant BFT to provide reasonable opportunity to harvest the coastwide quota.

On December 7, 2005 (70 FR 72724), NMFS adjusted the General category quota by conducting a 200 mt inseason quota transfer to the Reserve category, resulting in an adjusted General category quota of 708.3 mt. This action was taken to account for any potential overharvests that may occur in the Angling category during the 2005 fishing year (June 1, 2005 through May 31, 2006) and to ensure that U.S. BFT harvest is consistent with international and domestic mandates.

Catch rates in the BFT General category fishery have generally been low, the average catch rate for December 2005 and January 2006 is approximately 3.0 mt/day. Based on a review of dealer reports, daily landing trends, available quota, weather conditions, and the availability of BFT on the fishing grounds, NMFS has determined that waiving the final three RFDs established for January 27, 28, and 29, 2006, and increasing the General category daily BFT retention limit on those RFDs is warranted to assist the fishery in accessing the available quota. Therefore, NMFS adjusts the General category

daily BFT retention limits for January 27, 28, and 29, 2006, inclusive, to two large medium or giant BFT per vessel.

The intent of this current adjustment is to provide additional opportunities to utilize the landings quota of BFT while helping to achieve optimum yield in the General category BFT fishery, to collect a broad range of data for stock monitoring purposes, and to be consistent with the objectives of the HMS FMP.

Monitoring and Reporting

NMFS selected the RFDs being waived after examining current fishing year catch and effort rates, previous fishing years' catch and effort rates, forecasted weather patterns, and the available quota for the 2005 fishing year. NMFS will continue to monitor the BFT fishery closely through dealer landing reports until this fishery is closed. Fishermen may call the Atlantic Tunas Information Line at (888) 872–8862 or (978) 281–9260, or access the Internet at *www.nmfspermits.com* for updates on quota monitoring and retention limit adjustments.

Classification

The Assistant Administrator for Fisheries, NOAA (AA), finds that it is impracticable and contrary to the public interest to provide prior notice of, and an opportunity for, public comment on this action.

The regulations implementing the 1999 Fishery Management Plan (FMP) for Atlantic Tunas, Swordfish, and Sharks provide for inseason retention limit adjustments to respond to the unpredictable nature of BFT availability on the fishing grounds, the migratory nature of this species, and the regional variations in the BFT fishery. New information shows that landing rates are low and forecasted weather conditions are unfavorable for the upcoming open fishing days. Based on a review of recent information regarding the availability of BFT on the fishing grounds, dealer reports, daily landing trends, available quota, and weather conditions, NMFS has determined that this retention limit adjustment is warranted to increase access to available quota.

Delays in waiving the selected RFDs, and thereby not increasing the General category daily retention limit, would be contrary to the public interest. Such delays would adversely affect those General category vessels that would otherwise have an opportunity to harvest BFT on an RFD and would further exacerbate the problem of low catch rates. Limited opportunities to access the General category quota may have negative social and economic impacts to U.S. fishermen that depend on catching the available quota. For the General category, the selected RFDs need to be waived as expeditiously as possible for the General category participants to be able to take advantage of the adjusted retention limits and plan accordingly.

Therefore, the AA finds good cause under 5 U.S.C. 553(b)(B) to waive prior notice and the opportunity for public comment. For all of the above reasons, and because this action relieves a restriction (i.e., waives a number of RFDs, thus increasing the opportunity to retain more fish), there is also good cause under 5 U.S.C. 553(d) to waive the 30-day delay in effectiveness.

This action is being taken under 50 CFR 635.23(a)(4) and is exempt from review under Executive Order 12866.

Authority: 16 U.S.C. 971 *et seq.* and 1801 *et seq.*

Dated: January 20, 2006.

John H. Dunnigan

Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 06–762 Filed 1–23–06; 2:32 pm]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 041126333–5040–02; I.D. 012006A]

Fisheries of the Exclusive Economic Zone Off Alaska; Pollock in Statistical Area 610 of the Gulf of Alaska

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Temporary rule; closure.

SUMMARY: NMFS is prohibiting directed fishing for pollock in Statistical Area 610 of the Gulf of Alaska (GOA). This action is necessary to prevent exceeding the A season allowance of the 2006 total allowable catch (TAC) of pollock for Statistical Area 610 of the GOA.

DATES: Effective 1200 hrs, Alaska local time (A.l.t.), January 22, 2006, through 1200 hrs, A.l.t., March 10, 2006.

FOR FURTHER INFORMATION CONTACT: Josh Keaton, 907–586–7228.

SUPPLEMENTARY INFORMATION: NMFS manages the groundfish fishery in the GOA exclusive economic zone according to the Fishery Management Plan for Groundfish of the Gulf of Alaska (FMP) prepared by the North Pacific Fishery Management Council under authority of the Magnuson-Stevens Fishery Conservation and Management Act. Regulations governing fishing by U.S. vessels in accordance with the FMP appear at subpart H of 50 CFR part 600 and 50 CFR part 679.

The A season allowance of the 2006 TAC of pollock in Statistical Area 610 of the GOA is 5,047 metric tons (mt) as established by the 2005 and 2006 harvest specifications for groundfish of the GOA (70 FR 8958, February 24, 2005).

In accordance with § 679.20(d)(1)(i), the Regional Administrator has determined that the A season allowance of the 2006 TAC of pollock in Statistical Area 610 of the GOA will soon be reached. Therefore, the Regional Administrator is establishing a directed fishing allowance of 5,037 mt, and is setting aside the remaining 10 mt as bycatch to support other anticipated groundfish fisheries. In accordance with § 679.20(d)(1)(iii), the Regional Administrator finds that this directed fishing allowance has been reached. Consequently, NMFS is prohibiting directed fishing for pollock in Statistical Area 610 of the GOA.

After the effective date of this closure the maximum retainable amounts at §§ 679.20(e) and (f) apply at any time during a trip.

Classification

This action responds to the best available information recently obtained from the fishery. The Assistant Administrator for Fisheries, NOAA (AA), finds good cause to waive the requirement to provide prior notice and opportunity for public comment pursuant to the authority set forth at 5 U.S.C. 553(b)(B) as such requirement is impracticable and contrary to the public interest. This requirement is impracticable and contrary to the public interest as it would prevent NMFS from responding to the most recent fisheries data in a timely fashion and would delay the closure of pollock in Statistical Area 610 of the GOA. NMFS was unable to publish a notice providing time for public comment because the most recent, relevant data only became available as of January 19, 2006.

The AA also finds good cause to waive the 30 day delay in the effective date of this action under 5 U.S.C. 553(d)(3). This finding is based upon the reasons provided above for waiver of prior notice and opportunity for public comment.

This action is required by § 679.20 and is exempt from review under Executive Order 12866.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: January 20, 2006.

Alan D. Risenhoover,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 06–764 Filed 1–23–06; 2:32 pm]

BILLING CODE 3510–22–S

Proposed Rules

Federal Register
Vol. 71, No. 17
Thursday, January 26, 2006

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2006–23690; Directorate Identifier 2004–NM–133–AD]

RIN 2120–AA64

Airworthiness Directives; Airbus Model A300 B2 and B4 Series Airplanes; and Model A300 B4–600, B4–600R, and F4–600R Series Airplanes, and Model C4–605R Variant F Airplanes (Collectively Called A300–600 Series Airplanes)

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to supersede two existing airworthiness directives (AD) that apply to certain Airbus Model A300 B2, A300 B4, and A300–600 series airplanes. One AD currently requires an inspection for cracks of the lower outboard flange of gantry No. 4 in the main landing gear (MLG) bay area, and repair if necessary. The other AD currently requires, among other actions, repetitive inspections of the gantry lower flanges, and repair if necessary. The proposed AD also would require new repetitive inspections for cracks in the lower flange of certain gantries, and repair if necessary, which would end the existing inspection requirements. The proposed AD also would provide for optional terminating actions for the new repetitive inspections. This proposed AD results from a report of a large fatigue crack along the outboard flange of beam No. 4 and a subsequent determination that existing inspections are inadequate. We are proposing this AD to detect and correct fatigue cracks in the lower flanges of gantries 1 through 5 inclusive in the MLG bay area, which could result in reduced structural integrity of the fuselage, and consequent rapid decompression of the airplane.

DATES: We must receive comments on this proposed AD by February 27, 2006.

ADDRESSES: Use one of the following addresses to submit comments on this proposed AD.

- DOT Docket Web site: Go to *http://dms.dot.gov* and follow the instructions for sending your comments electronically.
- Government-wide rulemaking Web site: Go to *http://www.regulations.gov* and follow the instructions for sending your comments electronically.
- Mail: Docket Management Facility; U.S. Department of Transportation, 400 Seventh Street, SW., Nassif Building, Room PL–401, Washington, DC 20590.
- Fax: (202) 493–2251.
- Hand Delivery: Room PL–401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Contact Airbus, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France, for service information identified in this proposed AD.

FOR FURTHER INFORMATION CONTACT: Thomas Stafford, Aerospace Engineer, International Branch, ANM–116, FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 227–1622; fax (425) 227–1149.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to submit any relevant written data, views, or arguments regarding this proposed AD. Send your comments to an address listed in the **ADDRESSES** section. Include the docket number ''Docket No. FAA–2006–23690; Directorate Identifier 2004–NM–133–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of the proposed AD. We will consider all comments received by the closing date and may amend the proposed AD in light of those comments.

We will post all comments we receive, without change, to *http://dms.dot.gov*, including any personal information you provide. We will also post a report summarizing each substantive verbal contact with FAA personnel concerning this proposed AD. Using the search function of that web site, anyone can find and read the comments in any of our dockets, including the name of the individual who sent the comment (or signed the comment on behalf of an association, business, labor union, etc.). You may review the DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78), or you may visit *http://dms.dot.gov.*

Examining the Docket

You may examine the AD docket on the Internet at *http://dms.dot.gov*, or in person at the Docket Management Facility office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Docket Management Facility office (telephone (800) 647–5227) is located on the plaza level of the Nassif Building at the DOT street address stated in the **ADDRESSES** section. Comments will be available in the AD docket shortly after the Docket Management System receives them.

Discussion

On December 23, 2003, we issued AD 2003–26–10, amendment 39–13408 (69 FR 867, January 7, 2004), for certain Airbus Model A300 B2 and B4 series airplanes, and Model A300 B4–600, B4–600R, and F4–600R series airplanes, and Model C4–605R Variant F airplanes (collectively called A300–600 series airplanes). That AD requires a one-time inspection for cracking of the lower outboard flange of gantry No. 4 in the main landing gear (MLG) bay area, and repair if necessary. That AD resulted from a report of cracks found on the lower outboard flange of gantry No. 4 in the MLG bay area. We issued that AD to find and fix cracking of the lower outboard flange of gantry No. 4, which could result in reduced structural integrity of the fuselage, and consequent rapid decompression of the airplane.

On August 31, 2004, we issued AD 2004–18–13, amendment 39–13792 (69 FR 55329, September 14, 2004), for certain Airbus Model A300 B2 and B4 series airplanes, and Model A300 B4–601, B4–603, B4–605R, B4–620, B4–622R, C4–605R Variant F, and F4–605R airplanes. For certain airplanes, that AD requires a one-time inspection for cracking of the gantry lower flanges, and repair if necessary. That AD also requires repetitive inspections of the gantry lower flanges; repair if necessary; and reinforcement of the left-hand and right-hand gantry. That AD resulted from the issuance of mandatory

continuing airworthiness information by a foreign civil airworthiness authority. We issued that AD to detect and correct cracking of the gantry lower flanges in the MLG bay area, which could result in decompression of the airplane.

Actions Since Existing AD Was Issued

Since we issued AD 2004–18–13, we have received a report that, during an inspection required by that AD, a large fatigue crack running along the outboard flange of beam No. 4 was found. The report also indicates that the inspection requirements of ADs 2004–18–13 and 2003–26–10 do not adequately detect cracks in the lower flange of the left and right gantries 1 through 5 inclusive in the MLG bay area. Such cracks, if not detected and corrected, could result in reduced structural integrity of the fuselage, and consequent rapid decompression of the airplane.

Relevant Service Information

Airbus has issued Revision 01 of Service Bulletins A300–53–0379 (for Model A300 B2 and B4 series airplanes) and A300–53–6152 (for Model A300–600 series airplanes), both dated October 4, 2005. The service bulletins describe procedures for doing repetitive ultrasonic inspections or high frequency eddy current inspections, including rework of the pressure diaphragm, for cracks in the lower flange of the left and right gantries 1 through 5 inclusive between FR47 and FR54; and repairing any crack. The threshold for the compliance time ranges between 1,950 and 54,000 total flight cycles depending on the airplane configuration; the grace period is 1,500 flight cycles.

Accomplishing the actions specified in the service information described previously is intended to adequately address the unsafe condition. The DGAC mandated that service information and issued French airworthiness directive F–2005–091 R1, September 28, 2005, to ensure the continued airworthiness of these airplanes in France. The DGAC also approved the following service information as optional terminating actions for the repetitive ultrasonic and high frequency eddy current inspections described previously:

- Airbus Service Bulletins A300–53–0380, dated August 5, 2005 (for Model A300 B2 and B4 series airplanes), and A300–53–6153, dated August 24, 2005 (for Model A300–600 series airplanes). The service bulletins describe procedures for reinforcing the flanges of the left and right portals 1 through 5 inclusive between FR47 and FR54 of the landing gear, including a rotating probe inspection for cracks of the holes and repair if necessary.
- Airbus Service Bulletins A300–53–0360, dated May 3, 2002 (for Model A300 B2 and B4 series airplanes), and A300–53–6132, dated February 5, 2002 (for Model A300–600 series airplanes). The service bulletins describe procedures for reinforcing portals 3, 4, and 5 of the plates/skin.

FAA's Determination and Requirements of the Proposed AD

These airplane models are manufactured in France and are type certificated for operation in the United States under the provisions of § 21.29 of the Federal Aviation Regulations (14 CFR 21.29) and the applicable bilateral airworthiness agreement. Pursuant to this bilateral airworthiness agreement, the DGAC has kept the FAA informed of the situation described above. We have examined the DGAC's findings, evaluated all pertinent information, and determined that AD action is necessary for airplanes of this type design that are certificated for operation in the United States.

This proposed AD would supersede ADs 2003–26–10 and 2004–18–13 and retain certain requirements of AD 2003–26–10 and all requirements of AD 2004–18–13. This proposed AD also would require accomplishing the actions specified in Airbus Service Bulletins A300–53–0379 and A300–53–6152 described previously and would provide for optional terminating actions specified in the remaining service information described previously, except as discussed under ''Difference Between the Proposed AD and Service Information.''

Difference Between the Proposed AD and Service Information

The service information specifies to contact the manufacturer for instructions on how to repair certain conditions, but this proposed AD would require repairing those conditions using a method that we or the DGAC (or its delegated agent) approve. In light of the type of repair that would be required to address the unsafe condition, and consistent with existing bilateral airworthiness agreements, we have determined that, for this proposed AD, a repair we or the DGAC approve would be acceptable for compliance with this proposed AD.

Change to Existing AD

Since ADs 2003–26–10 and 2004–18–13 were issued, the AD format has been revised, and certain paragraphs have been rearranged. As a result, the corresponding paragraph identifiers have changed in this proposed AD, as listed in the following table:

REVISED PARAGRAPH IDENTIFIERS

Requirement in AD 2003–26–10	Corresponding requirement in this proposed AD
Paragraph (a)	Paragraph (f).
Paragraph (b)	Paragraph (g).
Requirement in AD 2004–18–13	**Corresponding requirement in this proposed AD**
Paragraph (a)	Paragraph (h).
Paragraph (b)	Paragraph (i).
Paragraph (c)	Paragraph (j).

Costs of Compliance

This proposed AD would affect about 165 airplanes of U.S. registry. The following table provides the estimated costs for U.S. operators to comply with this proposed AD. Not all actions must be completed on all airplanes.

ESTIMATED COSTS FOR REQUIRED ACTIONS

Action	Work hours	Average labor rate per hour	Parts	Cost per airplane	Number of U.S.-registered airplanes	Fleet cost
One-time inspection (required by AD 2003–26–10).	1	$65	None	$65	23	$1,495.
One-time inspection (required by AD 2004–18–13).	4	65	None	260	43	11,180.

ESTIMATED COSTS FOR REQUIRED ACTIONS—Continued

Action	Work hours	Average labor rate per hour	Parts	Cost per airplane	Number of U.S.-registered airplanes	Fleet cost
Repetitive inspections (required by AD 2004–18–13).	12	65	None	780, per inspection cycle.	78	60,840, per inspection cycle.
Repetitive inspections (new proposed actions).	16	65	None	1,040, per inspection cycle.	78	81,120, per inspection cycle.

ESTIMATED COSTS FOR OPTIONAL ACTIONS

Optional action	Work hours	Average labor rate per hour	Parts	Cost per airplane	Number of U.S.-registered airplanes
Reinforcement specified in Airbus Service Bulletin A300–53–0380, dated August 5, 2005.	807	$65	Between $87,100 and $121,560 depending on kit purchased.	Between $139,555 and $174,015 depending on airplane configuration.	23
Reinforcement specified in Airbus Service Bulletin A300–53–6153, dated August 24, 2005.	807	65	Between $82,460 and $87,070 depending on kit purchased.	Between $134,915 and $139,525 depending on airplane configuration.	120
Reinforcement specified in Airbus Service Bulletin A300–53–0360, dated May 3, 2002.	Between 24 and 128 depending on airplane configuration.	65	Between $250 and $1,000 depending on kit purchased.	Between $1,810 and $9,320 depending on airplane configuration.	23
Reinforcement specified in Airbus Service Bulletin A300–53–6132, dated February 5, 2002.	109	65	Between $260 and $950 depending on kit purchased.	Between $7,345 and $8,035 depending on airplane configuration.	120

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, section 106, describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the Agency's authority.

We are issuing this rulemaking under the authority described in subtitle VII, part A, subpart III, section 44701, ''General requirements.'' Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

We have determined that this proposed AD would not have federalism implications under Executive Order 13132. This proposed AD would not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify that the proposed regulation:

1. Is not a ''significant regulatory action'' under Executive Order 12866;

2. Is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and

3. Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

We prepared a regulatory evaluation of the estimated costs to comply with this proposed AD and placed it in the AD docket. See the **ADDRESSES** section for a location to examine the regulatory evaluation.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

Accordingly, under the authority delegated to me by the Administrator, the FAA proposes to amend 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

2. The Federal Aviation Administration (FAA) amends § 39.13 by removing amendments 39–13408 (69 FR 867, January 7, 2004) and 39–13792 (69 FR 55329, September 14, 2004) and adding the following new airworthiness directive (AD):

Airbus: Docket No. FAA–2006–23690; Directorate Identifier 2004–NM–133–AD.

Comments Due Date

(a) The FAA must receive comments on this AD action by February 27, 2006.

Affected ADs

(b) This AD supersedes ADs 2003–26–10 and 2004–18–13.

Applicability

(c) This AD applies to Airbus airplanes identified in Table 1 of this AD, certificated in any category.

TABLE 1.—APPLICABILITY

Affected Airbus airplanes	Except for those airplanes on which—
(1) All Model A300 B2–1A, B2–1C, B2K–3C, and B2–203 airplanes	None.
(2) All Model A300 B4–2C, B4–103, and B4–203 airplanes	None.
(3) Model A300 B4–601, B4–603, B4–620, and B4–622 airplanes	Airbus Modification 12169 has been incorporated in production.
(4) Model A300 B4–605R and B4–622R airplanes	Airbus Modification 12169 has been incorporated in production.
(5) Model A300 F4–605R and F4–622R airplanes	Airbus Modification 12169 has been incorporated in production.
(6) Model A300 C4–605R Variant F airplanes	Airbus Modification 12169 has been incorporated in production.

Unsafe Condition

(d) This AD results from a report of a large fatigue crack along the outboard flange of beam No. 4. We are issuing this AD to detect and correct fatigue cracks in the lower flanges of the left and right gantries 1 through 5 inclusive in the main landing gear (MLG) bay area, which could result in reduced structural integrity of the fuselage, and consequent rapid decompression of the airplane.

Compliance

(e) You are responsible for having the actions required by this AD performed within the compliance times specified, unless the actions have already been done.

Restatement of Requirements of AD 2003–26–10

One-Time Inspection

(f) For airplanes on which Airbus Modification 10147 has not been done: At the later of the times specified in paragraphs (f)(1) and (f)(2) of this AD: Do a one-time detailed inspection for cracking of the lower outboard flange of gantry No. 4 in the main landing gear bay area per paragraph 4.2.1 of Airbus All Operators Telex (AOT) A300–53A0371, Revision 01 (for Model A300 B2 and B4 series airplanes); or AOT A300–53A6145, Revision 01 (for Model A300–600 series airplanes); both dated September 10, 2003; as applicable.

(1) Before the accumulation of 8,000 total flight cycles since the date of issuance of the original Airworthiness Certificate or the date of issuance of the Export Certificate of Airworthiness, whichever is first.

(2) Within 30 days after January 22, 2004 (the effective date AD 2003–26–10).

Note 1: For the purposes of this AD, a detailed inspection is defined as: ''An intensive visual examination of a specific structural area, system, installation, or assembly to detect damage, failure, or irregularity. Available lighting is normally supplemented with a direct source of good lighting at intensity deemed appropriate by the inspector. Inspection aids such as mirror, magnifying lenses, etc., may be used. Surface cleaning and elaborate access procedures may be required.''

Repair

(g) Repair any cracking found during the inspection required by paragraph (f) of this AD before further flight, per a method approved by either the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA; or the Direction Generale de l'Aviation Civile (or its delegated agent).

Restatement of Requirements of AD 2004–18–13

One-time Inspection and Corrective Action

(h) For Model A300 B2–1A, B2–1C, B2K–3C, and B2–203 airplanes, and Model A300 B4–2C, B4–103, and B4–203 airplanes, on which Airbus Modification 3474 has been done: Prior to the accumulation of 16,300 total flight cycles, or within 500 flight cycles after July 30, 1998 (the effective date of AD 98–13–37), whichever occurs later, perform a one-time ultrasonic inspection for cracking of the gantry lower flanges in the MLG bay area, in accordance with Airbus AOT 53–11, dated October 13, 1997.

(1) If any cracking is detected, prior to further flight, repair in accordance with the AOT.

(2) If no cracking is detected, no further action is required by this paragraph.

Repetitive Inspections and Corrective Actions

(i) For Model A300 B4–601, B4–603, B4–605R, B4–620, B4–622R, C4–605R Variant F airplanes, and F4–605R airplanes, on which Airbus Modification 12169 has not been done in production: Perform the requirements of paragraphs (i)(1), (i)(2), (i)(3), and (i)(4) of this AD, in accordance with Airbus Service Bulletin A300–53–6128, dated March 5, 2001.

(1) At the later of the times specified in paragraphs (i)(1)(i) and (i)(1)(ii) of this AD, perform initial ultrasonic inspections or high-frequency eddy current inspections for cracks of the lower flanges of gantries 3, 4, and 5 between fuselage frames FR47 and FR54, in accordance with the Accomplishment Instructions, including the Synoptic Chart contained in Figure 2, sheets 1 through 5 inclusive, of the service bulletin.

(i) In accordance with the thresholds specified in the Synoptic Chart contained in Figure 2, sheets 1 through 5 inclusive, of the service bulletin; or

(ii) Within 200 flight cycles after October 19, 2004 (the effective date AD 2004–18–13).

(2) Perform repetitive ultrasonic inspections or high-frequency eddy current inspections for cracks of the lower flanges of gantries 3, 4, and 5 between fuselage frames FR47 and FR54, in accordance with the thresholds and Accomplishment Instructions, including the Synoptic Chart contained in Figure 2, sheets 1 through 5 inclusive, of the service bulletin.

(3) Perform repairs and reinforcements, in accordance with the thresholds and the Accomplishment Instructions, including the Synoptic Chart contained in Figure 2, sheets 1 through 5 inclusive, of the service bulletin, except as specified in paragraph (i)(4) of this AD.

(4) If a new crack is found during any action required by paragraph (i)(1), (i)(2) or (i)(3) of this AD and the Synoptic Chart contained in Figure 2, sheets 1 through 5 inclusive, of the service bulletin specifies to contact Airbus for appropriate action: Prior to further flight, repair per a method approved by the Manager, International Branch, ANM–116, or the Direction Generale de l'Aviation Civile (DGAC) (or its delegated agent).

Credit for Inspections Accomplished in Accordance With AOT

(j) Any inspection accomplished before October 19, 2004, in accordance with Airbus AOT 53–11, dated October 13, 1997, is acceptable for compliance with the corresponding inspection specified in paragraph (i)(1) of this AD, for that inspection area only. Operators must do the applicable inspections in paragraph (i)(1) of this AD for the remaining inspection areas.

New Requirements of This AD

Repetitive Inspections

(k) At the later of the applicable times specified in the ''Threshold (FC)'' and ''Grace Period'' columns of Tables 1 and 2 in paragraph 1.E of the applicable service bulletin in Table 2 of this AD: Do an ultrasonic inspection or high frequency eddy current (HFEC) inspection, including rework of the pressure diaphragm, for cracks in the lower flanges of the left and right gantries 1 through 5 inclusive between FR47 and FR54, in accordance with the Accomplishment Instructions of the applicable service bulletin in Table 2 of this AD. Repeat the inspection at the applicable times specified in the ''Interval (FC)'' column of Tables 1 and 2 in paragraph 1.E of the applicable service bulletin in Table 2 of this AD. Accomplishment of the initial inspection ends the inspections required by paragraphs (f), (h), and (i) of this AD.

TABLE 2.—SERVICE BULLETINS

Airbus service bulletin—	For airplanes identified in—
(1) A300–53–0379, Revision 01, dated October 4, 2005	Paragraphs (c)(1) and (c)(2) of this AD inclusive.
(2) A300–53–6152, Revision 01, dated October 4, 2005	Paragraphs (c)(3) through (c)(6) of this AD inclusive.

Corrective Action

(l) If any crack is detected during any ultrasonic or HFEC inspection required by paragraph (k) of this AD, before further flight, repair the crack in accordance with the Accomplishment Instructions of the applicable service bulletin in Table 2 of this AD, except as provided by paragraph (n) of this AD.

Optional Terminating Actions

(m) Accomplishment of the actions specified in Table 3 of this AD ends the repetitive inspections required by paragraph (k) of this AD.

TABLE 3.—OPTIONAL TERMINATING ACTIONS

Before or at the same time with—	Reinforce—	By doing all the actions in accordance with the accomplishment instructions of—	For airplanes identified in—
(1) The actions required by paragraph (k) of this AD and the action specified in paragraph (m)(2) of this AD.	The flanges of the left and right portals 1 through 5 inclusive between FR47 and FR54 of the landing gear, including a rotating probe inspection for cracks of holes and repair if necessary.	Airbus Service Bulletin A300–53–0380, dated August 5, 2005, except as provided by paragraph (n) of this AD.	Paragraphs (c)(1) and (c)(2) of this AD inclusive.
		Airbus Service Bulletin A300–53–6153, dated August 24, 2005, except as provided by paragraph (n) of this AD.	Paragraphs (c)(3) through (c)(6) of this AD inclusive.
(2) The actions required by paragraph (k) of this AD.	Portals 3, 4, and 5 of the plates/skin.	Airbus Service Bulletin A300–53–0360, dated May 3, 2002, except as provided by paragraph (n) of this AD.	Paragraphs (c)(1) and (c)(2) of this AD inclusive.
		Airbus Service Bulletin A300–53–6132, dated February 5, 2002, except as provided by paragraph (n) of this AD.	Paragraphs (c)(3) through (c)(6) of this AD inclusive.

Repair of Certain Cracks

(n) Where the applicable service bulletin recommends contacting Airbus for appropriate action: Before further flight, repair the crack in accordance with a method approved by the Manager, International Branch, ANM–116; or the DGAC (or its delegated agent).

Credit for Original Service Bulletins

(o) Accomplishing the inspections and repair before the effective date of this AD in accordance with Airbus Service Bulletin A300–53–0379, dated May 9, 2005; or Airbus Service Bulletin A300–53–6152, dated May 9, 2005; as applicable; is acceptable for compliance with the corresponding requirements of paragraphs (k) and (l) of this AD.

No Inspection Report

(p) Although the service bulletins in this AD specify to submit certain information to the manufacturer, this AD does not include that requirement.

Alternative Methods of Compliance (AMOCs)

(q)(1) The Manager, International Branch, ANM–116, has the authority to approve AMOCs for this AD, if requested in accordance with the procedures found in 14 CFR 39.19.

(2) Before using any AMOC approved in accordance with § 39.19 on any airplane to which the AMOC applies, notify the appropriate principal inspector in the FAA Flight Standards Certificate Holding District Office.

Related Information

(r) French airworthiness directive F–2005–091 R1, issued September 28, 2005, also addresses the subject of this AD.

Issued in Renton, Washington, on January 19, 2006.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E6–972 Filed 1–25–06; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2005–23275; Airspace Docket No. 05–AAL–40]

Proposed Revision of Class E Airspace; Cold Bay, AK

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking.

SUMMARY: This action proposes to revise the Class E airspace at Cold Bay, AK. Two new Standard Instrument Approach Procedures (SIAPs), and seven revised SIAPs are being published for the Cold Bay Airport. Adoption of this proposal would result in revised Class E airspace upward from 700 feet (ft.) and 1,200 ft. above the surface at Cold Bay, AK.

DATES: Comments must be received on or before March 13, 2006.

ADDRESSES: Send comments on the proposal to the Docket Management System, U.S. Department of Transportation, Room Plaza 401, 400 Seventh Street, SW., Washington, DC 20590–0001. You must identify the docket number FAA–2005–23275/ Airspace Docket No. 05–AAL–40, at the beginning of your comments. You may also submit comments on the Internet at *http://dms.dot.gov.* You may review the public docket containing the proposal, any comments received, and any final disposition in person in the Dockets Office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Docket Office (telephone

1–800–647–5527) is on the plaza level of the Department of Transportation NASSIF Building at the above address.

An informal docket may also be examined during normal business hours at the office of the Manager, Safety, Alaska Flight Service Operations, Federal Aviation Administration, 222 West 7th Avenue, Box 14, Anchorage, AK 99513–7587.

FOR FURTHER INFORMATION CONTACT: Gary Rolf, Federal Aviation Administration, 222 West 7th Avenue, Box 14, Anchorage, AK 99513–7587; telephone number (907) 271–5898; fax: (907) 271–2850; e-mail: *gary.ctr.rolf@faa.gov.* Internet address: *http://www.alaska.faa.gov/at.*

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal. Communications should identify both docket numbers and be submitted in triplicate to the address listed above. Commenters wishing the FAA to acknowledge receipt of their comments on this notice must submit with those comments a self-addressed, stamped postcard on which the following statement is made: ''Comments to Docket No. FAA–2005–23275/Airspace Docket No. 05–AAL–40.'' The postcard will be date/time stamped and returned to the commenter.

All communications received on or before the specified closing date for comments will be considered before taking action on the proposed rule. The proposal contained in this notice may be changed in light of comments received. All comments submitted will be available for examination in the public docket both before and after the closing date for comments. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

Availability of Notice of Proposed Rulemakings (NPRMs)

An electronic copy of this document may be downloaded through the Internet at *http://dms.dot.gov.* Recently published rulemaking documents can also be accessed through the FAA's Web page at *http://www.faa.gov* or the Superintendent of Document's Web page at *http://www.access.gpo.gov/nara.*

Additionally, any person may obtain a copy of this notice by submitting a request to the Federal Aviation Administration, Office of Air Traffic Airspace Management, ATA–400, 800 Independence Avenue, SW., Washington, DC 20591 or by calling (202) 267–8783. Communications must identify both docket numbers for this notice. Persons interested in being placed on a mailing list for future NPRMs should contact the FAA's Office of Rulemaking, (202) 267–9677, to request a copy of Advisory Circular No. 11–2A, Notice of Proposed Rulemaking Distribution System, which describes the application procedure.

The Proposal

The FAA is considering an amendment to the Code of Federal Regulations (14 CFR Part 71), which would revise the Class E airspace at Cold Bay, AK. The intended effect of this proposal is to modify Class E airspace upward from 700 ft. and 1,200 ft. above the surface to contain Instrument Flight Rules (IFR) operations at Cold Bay, AK.

The FAA Instrument Flight Procedures Production and Maintenance Branch has developed two new SIAPs, and modified seven SIAPs for the Cold Bay Airport. The new approaches are; (1) Area Navigation (Global Positioning System) (RNAV (GPS)) Runway (RWY) 14, original; (2) RNAV (GPS) RWY 32, original. The revised approaches are; (1) RNAV (GPS) RWY 26 Amendment (Amdt) 1; (2) Instrument Landing System (ILS) or Localizer (LOC)—Distance Measuring Equipment (DME) RWY 14, Amdt 17; (3) LOC-DME-Back Course RWY 32, Amdt 8; (4) Very High Frequency Omni-directional Range (VOR)—DME or Tactical Air Navigation (TACAN)–A, Amdt 3; (5) VOR RWY 14, Amdt 14; (6) High (HI)—ILS or LOC-DME RWY 14, Amdt 2; (7) HI-VOR-DME or TACAN RWY 14, Amdt 3. Class E controlled airspace extending upward from 700 ft. and 1,200 ft. above the surface within the Cold Bay Airport area would be revised by this action. The proposed airspace is sufficient to contain aircraft executing the new and revised instrument procedures at the Cold Bay Airport.

The area would be depicted on aeronautical charts for pilot reference. The coordinates for this airspace docket are based on North American Datum 83. The Class E airspace areas designated as 700/1200 foot transition areas are published in paragraph 6005 in FAA Order 7400.9N, *Airspace Designations and Reporting Points*, dated September 1, 2005, and effective September 15, 2005, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designations listed in this document would be published subsequently in the Order.

The FAA has determined that this proposed regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore —(1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle 1, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority.

This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart 1, Section 40103, Sovereignty and use of airspace. Under that section, the FAA is charged with prescribing regulations to ensure the safe and efficient use of the navigable airspace. This regulation is within the scope of that authority because it proposes to modify the Class E airspace sufficiently to contain aircraft executing instrument procedures at Cold Bay Airport and represents the FAA's continuing effort to safely and efficiently use the navigable airspace.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

In consideration of the foregoing, the Federal Aviation Administration proposes to amend 14 CFR part 71 as follows:

PART 71—DESIGNATION OF CLASS A, CLASS B, CLASS C, CLASS D, AND CLASS E AIRSPACE AREAS; AIRWAYS; ROUTES; AND REPORTING POINTS

1. The authority citation for 14 CFR part 71 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

§ 71.1 [Amended]

2. The incorporation by reference in 14 CFR 71.1 of Federal Aviation Administration Order 7400.9N, *Airspace Designations and Reporting Points*, dated September 1, 2005, and effective September 15, 2005, is to be amended as follows:

* * * * *

Paragraph 6002 Class E airspace designated as surface areas.

* * * * *

AAL AK E2 Cold Bay, AK [Revised]

Cold Bay Airport, AK
(Lat. 55°12′19″ N., long. 162°43′28″ W)

Within a 4.6-mile radius of the airport and within 1.7 miles each side of the 150° bearing extending from the 4.6-mile radius to 7.7 miles southeast of the airport and within 3 miles west and 4 miles east of the 335° bearing extending from the 4.6-mile radius to 12.2 miles northwest of the airport.

Paragraph 6005 Class E airspace extending upward from 700 feet or more above the surface of the earth.

* * * * *

AAL AK E5 Cold Bay, AK [Revised]

Cold Bay Airport, AK
(Lat. 55°12′19″ N., long. 162°43′28″ W)

That airspace extending upward from 700 feet above the surface within a 4.6-mile radius of the Cold Bay Airport and within 1.7 miles each side of the 150° bearing from the airport extending from the 4.6-mile radius to 7.7 miles southeast of the airport and within 3 miles west and 4 miles east of the 335° bearing from the airport extending from the 4.6-mile radius to 12.2 miles northwest of the airport; and that airspace extending upward from 1,200 feet above the surface within a 10.6-mile radius of the airport and within 9 miles east and 4.3 miles west of the 321° bearing from the airport extending from the 10.6-mile radius to 20 miles northwest of the airport and 4 miles each side of the 070° bearing from the airport extending from the 10.6-mile radius to 13.6 miles northeast of the airport.

* * * * *

Issued in Anchorage, AK, on January 13, 2006.

Anthony M. Wylie,

Manager, Safety, Area Flight Service Operations.

[FR Doc. E6–961 Filed 1–25–06; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG–138879–05]

RIN 1545–BE87

Treatment of Excess Loss Accounts

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking by cross-reference to temporary regulations.

SUMMARY: In the Rules and Regulations section of this issue of the **Federal Register**, the IRS is issuing temporary regulations that provide guidance under section 1502 that governs certain basis determinations and adjustments of subsidiary stock in certain transactions involving members of a consolidated group. The text of those regulations also serves as the text of these proposed regulations.

DATES: Written or electronic comments, and a request for a public hearing, must be received by April 26, 2006.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG–138879–05), room 5203, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand-delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG–138879–05), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, DC, or sent electronically, via the IRS internet site at *http://www.irs.gov/regs* or via the Federal eRulemaking Portal at *http://www.regulations.gov* (IRS and REG–138879–05).

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, Theresa M. Kolish, (202) 622–7530, concerning submissions of comments, Sonya Cruse, (202) 622–4693 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background and Explanation of Provisions

Temporary Regulations in the Rules and Regulations section of this issue of the **Federal Register** amend 26 CFR part 1 relating to section 1502. The temporary regulations add § 1.1502–19T. The text of those regulations also serves as the text of these proposed regulations. The preamble to the temporary regulations explains the amendments included in these proposed regulations.

Special Analysis

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. Further, it is hereby certified that these proposed regulations will not have a significant economic impact on a substantial number of small entities. This certification is based on the fact that these regulations will primarily affect affiliated groups of corporations that have elected to file consolidated returns, which tend to be larger business. Moreover, the number of taxpayers affected and the average burden are minimal. Accordingly, a Regulatory Flexibility Analysis under the Regulatory Flexibility Act (5 U.S.C. chapter 6) is not required. Pursuant to section 7805(f) of the Code, this notice of proposed rulemaking will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Comments and Requests for a Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written comments (a signed original and eight copies) that are submitted timely to the IRS. Alternatively, taxpayers may submit comments electronically via the IRS Internet site at *http://www.irs.gov/regs* or via the Federal eRulemaking Portal at *http://www.regulations.gov*. The IRS and Treasury Department request comments on the clarity of the proposed rules and how they can be made easier to understand. All comments will be available for public inspection and copying. A public hearing may be scheduled if requested in writing by any person who timely submits written comments. If a public hearing is scheduled, notice of the date, time, and place of the hearing will be published in the **Federal Register**.

Drafting Information

The principal authors of these regulations are Emidio J. Forlini, Jr. and Theresa M. Kolish of the Office of Associate Chief Counsel (Corporate). Other personnel from Treasury and the IRS participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

Accordingly, 26 CFR part 1 is proposed to be amended as follows:

PART 1—INCOME TAXES

Paragraph 1. The authority citation for part 1 continues to read, in part, as follows:

Authority: 26 U.S.C. 7805 * * *
Section 1.1502–19 also issued under 26 U.S.C. 1502. * * *

Par. 2. Section 1.1502–19 is amended by:

1. Revising paragraph (d).
2. Revising paragraph (g) *Example 2.*
3. Revising the paragraph heading for paragraph (h).
4. Adding paragraph (h)(2)(iv).
5. Adding new paragraph (h)(3).

The revisions and additions read as follows:

§ 1.1502–19 Excess Loss Accounts.

[The text of the proposed § 1.1502–19 is the same as the text for § 1502–19T published elsewhere in this issue of the **Federal Register**].

Mark E. Matthews,

Deputy Commissioner for Services and Enforcement.

[FR Doc. 06–586 Filed 1–23–06; 11:43 am]

BILLING CODE 4820–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG–146459–05]

RIN 1545–BF04

Designated Roth Accounts Under Section 402A

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document contains proposed regulations under sections 402(g), 402A, 403(b), and 408A of the Internal Revenue Code (Code) relating to designated Roth accounts. These regulations will affect administrators of, employers maintaining, participants in, and beneficiaries of section 401(k) and section 403(b) plans, as well as owners and beneficiaries of Roth IRAs and trustees of Roth IRAs.

DATES: Written or electronic comments and requests for a public hearing must be received by April 26, 2006.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG–146459–05), room 5203, Internal Revenue Service, POB 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand-delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to: CC:PA:LPD:PR (REG–146459–05), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, DC. Alternatively, taxpayers may submit comments electronically directly to the IRS Internet site at *http://www.irs.gov/regs,* or via the Federal eRulemaking Portal at *http://www.regulations.gov* (IRS–REG–146459–05).

FOR FURTHER INFORMATION CONTACT: Concerning the regulations, R. Lisa Mojiri-Azad, 202–622–6060 or Cathy A. Vohs, 202–622–6090; Concerning the submission of comments or to request a public hearing, Richard Hurst at *Richard.A.Hurst@irscounsel.treas.gov* or (202) 622–7180 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collection of information contained in this notice of proposed rulemaking has been submitted to the Office of Management and Budget for review in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)). Comments on the collection of information should be sent to the Office of Management and Budget, Attn: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503, with copies to the Internal Revenue Service, Attn: IRS Reports Clearance Officer, SE:W:CAR:MP:T:T:SP; Washington, DC 20224. Comments on the collection of information should be received by March 27, 2006. Comments are specifically requested concerning:

Whether the proposed collection of information is necessary for the proper performance of the functions of the Internal Revenue Service, including whether the information will have practical utility;

The accuracy of the estimated burden associated with the proposed collection of information (see below);

How the quality, utility, and clarity of the information to be collected may be enhanced;

How the burden of complying with the proposed collection of information may be minimized, including through the application of automated collection techniques or other forms of information technology; and

Estimates of capital or start-up costs and costs of operation, maintenance, and purchase of service to provide information.

The collection of information in this proposed regulation is in 26 CFR 1.402A–2. This information is required to comply with the separate accounting and recordkeeping requirements of section 402A. This information will be used by the IRS and employers maintaining designated Roth accounts to insure compliance with the requirements of section 402A. The collection of information is required to obtain a benefit. The likely recordkeepers are state or local governments, business or other for-profit institutions, nonprofit institutions, and small businesses or organizations.

Estimated total annual recordkeeping burden: 828,000 hours.

Estimated average annual burden hours per recordkeeper: 2.3 hours.

Estimated number of recordkeepers: 357,000.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by the Office of Management and Budget.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Background

This document contains proposed regulations under sections 402(g), 402A, 403(b), and 408A of the Internal Revenue Code. Section 402A, which sets forth rules for designated Roth contributions, was added to the Code by section 617(a) of the Economic Growth and Tax Relief Reconciliation Act of 2001, Public Law 107–16 (115 Stat. 103) (EGTRRA), effective for taxable years beginning after December 31, 2005.

Section 401(k) sets forth rules for qualified cash or deferred arrangements under which an employee may make an election between cash and an employer contribution to a plan qualified under section 401(a) and section 403(b) permits a similar salary reduction agreement under which payments are made to a section 403(b) plan. Section 402(e)(3) provides that an amount is not includible in an employee's income merely because the employee has an election whether these contributions will be made to the trust or annuity or received by the employee in cash.

Amounts contributed pursuant to these qualified cash or deferred arrangements and salary reduction agreements are defined in section 402(g)(3) as elective deferrals and section 402(g)(1) provides a limit on the amount of elective deferrals that may be excluded from an employee's income for a taxable year. Section 402(g)(2)

provides for the distribution of elective deferrals that exceed the annual limit on elective deferrals (an excess deferral).

A designated Roth contribution is an elective deferral, as described in section 402(g)(3)(A) or (C), to a section 401(k) or 403(b) plan that has been designated by an employee, pursuant to section 402A, as not excludable from the employee's gross income. Under section 402A(b)(2), designated Roth contributions must be maintained by the plan in a separate account (a designated Roth account).

Under section 402(a), a distribution from a plan qualified under section 401(a) is taxable under section 72 to the distributee in the taxable year distributed. However, pursuant to section 402A(d)(1), a qualified distribution from a designated Roth account is excludable from gross income. A qualified distribution is defined in section 402A(d)(2) as a distribution that is made after completion of a specified 5-year period and the satisfaction of other specified requirements.

If the distribution is not a qualified distribution, pursuant to section 72, the distribution is included in the distributee's gross income to the extent allocable to income on the contract and excluded from gross income to the extent allocable to investment in the contract (basis). The amount of a distribution allocated to investment in the contract is determined by applying to the distribution the ratio of the investment in the contract to the account balance.

Section 402(c) provides rules under which certain distributions from a plan qualified under section 401(a) may be rolled over into another eligible retirement plan. In such a case, the distribution is not currently includible in the distributee's gross income. Under section 402(c)(2), to the extent some or all of the distribution from a plan qualified under section 401(a) would not have been includible in gross income if it were not rolled over, that portion of the distribution can only be rolled over into an individual retirement plan, or through a direct rollover to another plan qualified under section 401(a) which agrees to separately account for such rolled over amounts. Section 403(b)(8)(B) provides that the rules of section 402(c)(2) also apply for purposes of the rollover rules under section 403(b)(8).

Under section 402(c)(8) and 402A(c)(3), a distribution from a designated Roth account can be rolled over only to another designated Roth account or to a Roth IRA. Under section 408A, a Roth IRA is a type of individual retirement plan (IRA) under which contributions to the account are never deductible and qualified distributions from the account are excludable from gross income. Section 408A(d)(4) sets forth special ordering rules for the return of basis in the case of a distribution from a Roth IRA. Under these ordering rules, in the case of nonqualified distribution from the account, basis is recovered before income is taxed.

Section 617(d) of EGTRRA amended section 6051(a)(8) to require the reporting of designated Roth contributions on Form W–2, ''Wage and Tax Statement'' and added a new subsection (f) to section 6047 to require plan administrators or other responsible persons of section 401(k) or 403(b) plans to make such returns and reports regarding designated Roth contributions to the Secretary of the Treasury and such other persons the Secretary may prescribe.

Final regulations under section 401(k) were issued on December 29, 2004 (69 FR 78144). Those final regulations reserved § 1.401(k)–1(f) for special rules for designated Roth contributions. On March 2, 2005, proposed regulations to fill in that reserved paragraph and provide additional rules applicable to designated Roth contributions were issued (70 FR 10062). Final regulations adopting those proposed regulations, with certain modifications, were issued on January 3, 2006 (71 FR 6). The provisions of the final section 401(k) regulations regarding designated Roth contributions do not address the taxability of distributions from designated Roth accounts or the reporting requirements that apply to contributions of designated Roth contributions or distributions from the accounts.[1]

These proposed regulations under section 402A are intended to provide comprehensive guidance on the taxation of distributions from designated Roth accounts under section 401(k) and section 403(b) plans. The proposed regulations also provide guidance on the reporting requirements with respect to these accounts. In addition, these proposed regulations provide guidance with respect to designated Roth contributions under section 403(b) plans by amending the proposed section 403(b) regulations issued in 2004 (2004 proposed section 403(b) regulations), which were published in the **Federal Register** on November 16, 2004 (69 FR 67075), to reflect the provisions of section 402A.

Finally, these proposed regulations include amendments to the regulations under section 402(g) issued in 1991 in order to reflect the enactment of section 402A (as well as other statutory changes since those regulations were issued) and to make changes to conform the regulations under section 402(g) to the final section 401(k) regulations. These proposed regulations also add a new § 1.408A–10 to the existing regulations under section 408A for Roth IRAs (§ 1.408A–1 through 9) issued in 1999 to reflect the interaction between section 408A and section 402A.

Explanation of Provisions

Overview

These proposed regulations provide guidance on the taxation of distributions from designated Roth accounts and other related issues. A designated Roth account is a separate account under a section 401(k) plan or section 403(b) plan to which designated Roth contributions are made, and for which separate accounting of contributions, gains, and losses are maintained. These proposed regulations clarify that any transaction or accounting methodology involving an employee's designated Roth account and any other accounts under the plan or plans of an employer that has the effect of directly or indirectly transferring value from another account into the designated Roth account violates the separate accounting requirement under section 402A.

The taxation of a distribution from a designated Roth account depends on whether or not the distribution is a qualified distribution. A qualified distribution from a designated Roth account is not includible in the employee's gross income. A qualified distribution is generally a distribution that is made after a 5-taxable-year period of participation and that either (1) is made on or after the date the employee attains age 59½, (2) is made after the employee's death, or (3) is attributable to the employee's being disabled within the meaning of section 72(m)(7).

Determination of 5-Year Rule for Qualified Distributions

In order for a distribution from a designated Roth account to be a qualified distribution and thus not includible in gross income, a 5-taxable-

[1] The preamble to the proposed regulations under section 401(k) regarding designated Roth contributions, which were issued on March 2, 2005, requested comments on the issues for which guidance is needed with respect to the taxation of distributions from designated Roth accounts and any other issues under section 402A on which guidance is needed. A number of comments were received in response to that solicitation and those comments have been taken into account in developing these proposed regulations.

year requirement must be satisfied. These proposed regulations would reflect the rule in section 402A that the 5-taxable-year period during which a distribution is not a qualified distribution begins on the first day of the employee's taxable year for which the employee first had designated Roth contributions made to the plan and ends when 5 consecutive taxable years have been completed. However, if a direct rollover is made from a designated Roth account under another plan, the 5-taxable-year period for the recipient plan begins on the first day of the employee's taxable year for which the employee first had designated Roth contributions made to the other plan, if earlier.

Taxation of Nonqualified Distributions

Some commentators requested that the special ordering rules in section 408A(d), providing that the first distributions from a Roth IRA are a return of contributions (and thus not includible in gross income) until all contributions have been returned as basis, be applied to distributions from a designated Roth account. Although designated Roth contributions to a designated Roth account bear some similarity to contributions to a Roth IRA (*e.g.,* contributions to either type of account are after-tax contributions and qualified distributions from either type of account are excludable from gross income), there are many differences between these types of arrangements.

Section 402A does not provide that the special ordering rules of section 408A(d) apply to distributions from designated Roth accounts and, thus, these proposed regulations do not apply those special ordering rules. The only special rule under section 402A for nonqualified distributions from a designated Roth account is that the account is treated as a separate contract for purposes of section 72. Thus, these proposed regulations provide that a distribution from a designated Roth account that is not a qualified distribution is taxable to the distributee under section 402 (or section 403(b)(1)), treating the designated Roth account as a separate contract under section 72. In applying that treatment, the portion of any distribution that is includible in gross income as an amount allocable to income on the contract and the portion not includible in income as an amount allocable to investment in the contract is generally determined under section 72(e)(8). For example, if a nonqualified distribution of $5,000 is made from an employee's designated Roth account when the account consists of $9,400 of designated Roth contributions and $600 of earnings, the distribution consists of $4,700 of designated Roth contributions (that are not includible in the employee's gross income) and $300 of earnings (that are includible in the employee's gross income).

Rollover of Designated Roth Contributions

As described above in the Background section of this preamble, section 402(c)(2) provides that, if a portion of the distribution from a plan qualified under section 401(a) is not includible in income (determined without regard to the rollover), that portion of the distribution can only be rolled over by a direct rollover of the distribution to another plan qualified under section 401(a) that agrees to separately account for the amount not includible in income. (Alternatively the distribution can be rolled over to an IRA in either a 60-day rollover or direct rollover.) The rule under section 402(c)(2) requiring direct rollover is designed to insure that the portion of the rolled over distribution that is investment in the contract is properly accounted for in the recipient plan.

Section 402A(c)(3) provides that a rollover contribution of a distribution from a designated Roth account may only be made to the extent it is otherwise allowable. Section 402(c)(2) provides rules regarding when a rollover contribution of amounts not includable in gross income are allowable. The IRS and Treasury Department believe that the rules in section 402(c)(2) relating to the distribution of an amount not includable in gross income apply to a distribution from a designated Roth account.[2] Thus, these regulations would provide that if the portion of a distribution from a designated Roth account under a plan qualified under section 401(a) that is not includible in income is to be rolled over into a designated Roth account under another plan, the rollover of the distribution must be accomplished through a direct rollover (*i.e.,* a rollover to another designated Roth account is not available for the portion of the distribution not includible in gross income if the distribution is made directly to the employee) and can only be made to a plan qualified under section 401(a) which agrees to separately account for the amount not includible in income (*i.e.,* it cannot be rolled over into a section 403(b) plan). To insure that there is proper accounting in the recipient plan, as described under *Reporting and recordkeeping* the distributing plan is required to report the amount of the investment in the contract and the first year of the 5-year period to the recipient plan so that the recipient plan will not need to rely on information from the distributee.

If a distribution from a designated Roth account is made to the employee, the employee would still be able to roll over the entire amount (or any portion thereof) into a Roth IRA within a 60-day period. Under section 402(c)(2), if only a portion of the distribution is rolled over, the portion that is not rolled over is treated as consisting first of the amount of the distribution that is includible in gross income. These regulations would provide that the income limits for contributions for Roth IRAs do not apply for this purpose.

Alternatively, the employee is permitted to roll over the taxable portion of the distribution to a designated Roth account under either a section 401(a) or 403(b) plan within a 60-day period. In such a case, additional reporting is required from the recipient plan, as described below under the heading *Reporting and recordkeeping*. In addition, the employee's period of participation under the distributing plan is not carried over to the recipient plan for purposes of determining whether the employee satisfies the 5-taxable-year requirement under the recipient plan.

Determination of 5-Taxable-Year Period After a Rollover to a Roth IRA

Section 402A and section 408A each provide for a 5-taxable-year period that must be completed in order for a distribution from a designated Roth account or a Roth IRA to be a qualified distribution. However, each of these sections contains different rules for determining when the 5-taxable-year requirement is satisfied. Generally, under section 402A, satisfaction of the 5-taxable-year requirement with respect to a designated Roth account under a plan is based on the years since a designated Roth contribution was first made by the employee under that plan. In contrast, the 5-year period under section 408A begins with the first taxable year for which a contribution is made to any Roth IRA.

Commentators suggested that, if a distribution from a designated Roth account to an individual is rolled into a Roth IRA, the individual receive credit under the 5-year rule in section 408A for the years since the individual first made a contribution to a designated Roth account. The IRS and Treasury

[2] For distributions from designated Roth accounts, there is the same need for proper accounting of investment in the contract as for distributions from other accounts that include after-tax contributions. In addition, it is necessary to track whether the employee has satisfied the 5-year rule for qualified distributions.

Department do not believe that the Code permits this interaction between the two 5-year rules. Instead, these proposed regulations would provide that the 5-taxable-year period described in section 402A and the 5-taxable-year period described in section 408A(d)(2)(B) are determined independently. Thus, in the case of a rollover of a distribution from a designated Roth account maintained under a section 401(k) or 403(b) plan to a Roth IRA, the period that the rolled-over funds were in the designated Roth account does not count towards the 5-taxable-year period for determining qualified distributions from the Roth IRA. However, if an individual had established a Roth IRA in a prior year, the 5-year period for determining qualified distributions from a Roth IRA that began as a result of that earlier Roth IRA contribution applies to any distributions from the Roth IRA (including a distribution of an amount attributable to a rollover contribution from a designated Roth account).

If a nonqualified distribution from a designated Roth account is rolled over into a Roth IRA, the portion of the distribution that constitutes a nontaxable return of investment in the contract is treated as basis in the Roth IRA. However, the proposed regulations would provide that, if a qualified distribution from a designated Roth account is rolled over into a Roth IRA, the entire amount of the distribution will be treated as basis in the Roth IRA. As a result, a subsequent distribution from the Roth IRA in the amount of the rollover would be treated as a tax-free return of basis regardless of whether the individual had maintained a Roth IRA for 5 years (although the investment return on that amount earned in the Roth IRA would not be excluded from income when distributed unless the distribution satisfied the requirements for a qualified distribution from a Roth IRA).

Under section 402A(c)(3)(B), only an amount rolled over from a designated Roth account is not taken into account for purposes of section 402A(c). Thus, these proposed regulations provide that a distribution from a Roth IRA cannot be rolled over into a designated Roth account.

Certain Amounts Not Qualified Distributions

Section 1.402(c)–2, A–4, provides a list of amounts that are not treated as eligible rollover distributions and are instead currently includible in income. These proposed regulations would provide that these same amounts also cannot be qualified distributions. Distributions described in A–4(a) (distribution of elective deferrals in excess of the section 415 limits), (b) (corrective distribution of excess deferrals), and (c) (corrective distribution of excess contributions or excess aggregate contributions), have statutorily specified tax treatments. In the case of a deemed distribution under section 72(p) or the cost of current life insurance protection, an actual amount has not in fact been distributed. In the case of distributions of dividends deductible under section 404(k), section 72(e)(5)(D) and § 1.404k–1(t) provide that these amounts are treated as paid under a separate contract providing only for payment of deductible dividends. However, if a dividend described in section 404(k) has been reinvested in accordance with section 404(k)(2)(iii)(II), then a distribution of the reinvested amount can be a qualified distribution.

Distribution of Employer Securities

The proposed regulations would also provide rules relating to the distribution of employer securities and the application of the net unrealized appreciation election of section 402(e)(4). If a qualified distribution includes employer securities, the distribution is not includible in gross income and the basis of each security in the hands of the distributee is the fair market value of the security on the date of the distribution. In such a case, the distributee will receive capital gains treatment at the time of any future disposition of the security, to the extent of any post-distribution appreciation. If a distribution with respect to employer securities is not a qualified distribution, the rules of section 402(e)(4) apply in the same manner as to any other distribution except that the designated Roth account is treated as a separate contract.

Designated Roth Accounts Under Section 403(b) Plans

These proposed regulations amend the 2004 proposed section 403(b) regulations to reflect the provisions of section 402A. Generally, these proposed regulations merely incorporate basic and definitional rules for a designated Roth program in § 1.401(k)–1(f) under a section 401(k) plan into the 2004 proposed section 403(b) proposed regulations under section 403(b). Further, these proposed regulations also incorporate the taxation rules in section 402A into the 2004 proposed regulations under section 403(b) and clarify the taxation rules of section 402(c)(2) as they would apply to distributions from a section 403(b) plan. Thus, these proposed regulations provide that to the extent some or all of the distribution from a section 403(b) plan (including a distribution of an amount from a designated Roth account) would not have been includible in gross income if it were not rolled over, that portion of the distribution can only be rolled over into an individual retirement plan, or through a direct rollover to another section 403(b) plan which agrees to separately account for such rolled over amounts.

However, there is one issue that is unique to section 403(b) plans: the interaction between the right to make designated Roth contributions and the universal availability requirement in section 403(b)(12)(A)(ii). These proposed regulations provide that the universal availability requirement of section 403(b)(12) includes the right to make designated Roth contributions. Thus, if any employee is given the opportunity to designate section 403(b) elective deferrals as designated Roth contributions, then all employees must be given that right. These proposed regulations do not address what other rights with respect to section 403(b) elective deferrals under a section 403(b) plan may also be subject to the universal availability requirement.

Reporting and Recordkeeping

Under these proposed regulations, the plan administrator or other responsible party with respect to a plan with a designated Roth account would be responsible for keeping track of the 5-taxable-year period for each employee and the amount of designated Roth contributions made on behalf of such employee. In addition, the plan administrator or other responsible party of a plan directly rolling over a distribution would be required to provide the plan administrator of the recipient plan (*i.e.*, the plan accepting the eligible rollover distribution) with a statement indicating either the first year of the 5-taxable-year period for the employee and the portion of such distribution attributable to basis or that the distribution is a qualified distribution. If the distribution is not a direct rollover to a designated Roth account under another eligible plan, the plan administrator or responsible party must provide to the employee, upon request, this same information, except the statement need not indicate the first year of the 5-taxable-year period. The statement would be required to be provided within a reasonable period following the direct rollover (or employee request), but in no event later than 30 days following the direct rollover (or employee request), and the plan administrator or other responsible

party for the recipient plan would be permitted to rely on these statements.

In order to give plans sufficient time to develop systems to comply with these reporting requirements, these reporting and record keeping requirements are proposed to be effective beginning with the 2007 taxable year. However, plan administrators are cautioned that it will not be possible for a plan to comply with the separate accounting requirement under section 402A and the recently published final regulations with respect to Roth 401(k) plans without keeping track of each employee's investment in the contract under the designated Roth account. Further, for any plan accepting a rollover from another designated Roth account, the proposed regulations only permit reliance for purposes of the record keeping requirement in future years on a statement from the plan administrator (or other responsible party) for the other plan. Consequently, we would anticipate that plans accepting a rollover contribution to a designated Roth account during 2006 would request representations from the other plan administrator (or responsible party) that the distribution being rolled over is from a designated Roth account and stating what portion of the distribution is investment in the contract.

As noted above, to the extent that a portion of a distribution is includible in income (determined without regard to the rollover), if any portion of that distribution is rolled over to a designated Roth account by the distributee rather than by direct rollover, the plan administrator of the recipient plan must notify the IRS of its acceptance of the rollover contribution. The notification is required to be sent to an address to be specified by the Commissioner and must include: (1) The employee's name and social security number; (2) the amount rolled over; (3) the year in which the rollover contribution was made; and (4) such other information as the Commissioner may require in future published guidance in order to determine that the amount rolled over is a valid rollover contribution.

With respect to other reporting, generally, the same reporting requirements apply to plans with designated Roth accounts as apply to other plans. A contribution to and a distribution from a designated Roth account must be reported on Form W–2 and Form 1099–R, ''Distributions From Pensions, Annuities, Retirement or Profit-Sharing Plans, IRA, Insurance Contracts'' respectively, in accordance with the instructions thereto. It is expected that the instructions to Form 1099–R will be changed to require that a separate Form 1099–R be used to report the amount of a distribution from a designated Roth account, the taxable amount with respect to the distribution, and the first year of the 5-taxable year period. An employee has no reporting obligation with respect to designated Roth contributions under a section 401(k) or 403(b) plan. However, an employee rolling over a distribution from a designated Roth account to a Roth IRA should keep track of the amount rolled over in accordance with the instructions to Form 8606, ''Nondeductible IRA's.''

Designated Roth Contributions as Excess Deferrals

Even though designated Roth contributions are not excluded from income when contributed, they are treated as elective deferrals for purposes of section 402(g). Thus, to the extent total elective deferrals for the year exceed the section 402(g) limit for the year, the excess amount can be distributed by April 15th of the year following the year of the excess without adverse tax consequences. However, if such excess deferrals are not distributed by April 15th of the year following the year of the excess, these proposed regulations would provide that any distribution attributable to an excess deferral that is a designated Roth contribution is includible in gross income (with no exclusion from income for amounts attributable to basis under section 72) and is not eligible for rollover. These regulations would provide that if there are any excess deferrals that are designated Roth contributions that are not corrected prior to April 15th of the year following the excess, the first amounts distributed from the designated Roth account are treated as distributions of excess deferrals and earnings until the full amount of the those excess deferrals (and attributable earnings) are distributed.

Gap Period Income

In addition, these proposed regulations conform the gap period income rules for a distribution of excess deferrals under section 402(g) to the gap period income rules in the 2004 final section 401(k) and 401(m) regulations by providing that gap period income (*i.e.*, income for the period after the taxable year) needs to be included in the distribution to the extent the employee is or would be credited with allocable gain or loss on those excess deferrals for that period, if the total account were to be distributed. This gap period income rule applies to both pre-tax excess deferrals and designated Roth contributions.

Effective Date

Section 402A applies to employees' taxable years beginning on or after January 1, 2006. The proposed regulations under section 402A are generally proposed to be applicable for taxable years beginning on or after January 1, 2007. However, certain provisions in the proposed regulations under section 402A are proposed to be applicable at the same time as section 402A. These include the clarification that the separate accounting requirement does not permit any transaction or accounting methodology that transfers value between designated Roth accounts and other accounts under a plan and the rules relating to rollovers to designated Roth accounts and Roth IRAs. Similarly, the proposed regulations under section 408A would be applicable at the same time as section 402A. These proposed regulations also address the treatment of rollover contributions to Roth IRAs and designated Roth accounts.

The proposed amendments to the regulations under section 402(g) relating to designated Roth contributions also are proposed to be applicable at the same time as section 402A. Thus, those proposed amendments would be applicable for excess deferrals for taxable years beginning on or after January 1, 2006. The rule requiring distribution of gap period income on excess deferrals applies to distributions in taxable years beginning on or after January 1, 2007, and thus will generally also apply for excess deferrals for taxable years beginning on or after January 1, 2006. As a result, this requirement generally would become applicable when the corresponding requirement under the 2004 final 401(k) and (m) regulations that distributions to correct excess contributions and excess aggregate contributions include gap period income becomes applicable.

The proposed amendments to the 2004 proposed section 403(b) regulations will not be applicable earlier than the applicability date of those regulations when they are finalized. The IRS and Treasury Department expect that the 2004 proposed section 403(b) regulations when finalized will be applicable for taxable years on or after January 1, 2007.

For the period after section 402A is applicable and before these proposed regulations are made final, taxpayers may rely on these proposed regulations. If, and to the extent, future guidance is more restrictive than the guidance in

these proposed regulations, the future guidance will be applied without retroactive effect.

These regulations do not provide rules for the application of the EGTRRA sunset provision (section 901 of EGTRRA), under which the provisions of EGTRRA do not apply to taxable, plan, or limitation years beginning after December 31, 2010. Unless the EGTRRA sunset provision is repealed before it becomes effective, additional guidance will be needed to clarify its application.

Special Analyses

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It has also been determined that 5 U.S.C. 553(b) does not apply to these regulations. It is hereby certified that the collection of information in these regulations will not have a significant economic impact on a substantial number of small entities. This certification is based on the fact that most small entities that will maintain a designated Roth account already use a third party provider to administer the plan and the collection of information in these regulations, which is required to comply with the separate accounting and recordkeeping requirements of section 402A(b), will only minimally increase the third party provider's administrative burden with respect to the plan. Therefore, an analysis under the Regulatory Flexibility Act (5 U.S.C. chapter 6) is not required. Pursuant to section 7805(f) of the Code, this notice of proposed rulemaking will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Comments and Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written (a signed original and eight (8) copies) or electronic comments that are submitted timely to the IRS. The IRS and Treasury Department specifically request comments on the clarity of the proposed regulations and how they may be made easier to understand. All comments will be available for public inspection and copying. A public hearing will be scheduled if requested in writing by any person that timely submits written comments. If a public hearing is scheduled, notice of the date, time, and place for the public hearing will be published in the **Federal Register**.

Drafting Information

The principal authors of these regulations are Cathy Vohs and R. Lisa Mojiri-Azad, Office of Division Counsel/ Associate Chief Counsel (Tax Exempt and Government Entities). However, other personnel from the IRS and Treasury Department participated in the development of these regulations.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

Accordingly, 26 CFR part 1 is proposed to be amended as follows:

PART 1—INCOME TAXES

Paragraph 1. The authority citation for part 1 is amended to read, in part, as follows:

Authority: 26 U.S.C. 7805 * * * Section 1.402A–1 is also issued under 26 U.S.C. 402A .* * *

Par. 2. Section 1.402(g)–1 is amended as follows:

1. Revise the second sentence and add a third sentence to paragraph (a).
2. Add new paragraphs (b)(5) and (b)(6).
3. Revise paragraph (d).
4. Revise paragraph (e)(2) introductory text.
5. Revise paragraph (e)(2)(i).
6. Revise the second sentence and add a new third sentence in paragraph (e)(3)(i)(A).
7. Revise paragraph (e)(5)(i).
8. Add a sentence after the last sentence in paragraph (e)(5)(ii).
9. Revise paragraph (e)(5)(iii).
10. Add paragraph (e)(5)(v).
11. Add paragraph (e)(8)(iv).

The additions and revisions to § 1.402(g)–1 read as follows:

§ 1.402(g)–1 Limitation on exclusion for elective deferrals.

(a) *In general.* * * * Thus, an individual's elective deferrals in excess of the applicable limit for a taxable year (i.e., the individual's excess deferrals for the year) must be included in gross income for the year , except to the extent the excess deferrals are comprised of designated Roth contributions, and thus, are already includible in gross income. A designated Roth contribution is treated as an excess deferral only to the extent that the total amount of designated Roth contributions for an individual exceeds the applicable limit for the taxable year or the designated Roth contributions are identified as excess deferrals and the individual receives a distribution of the excess deferrals and allocable income under paragraph (e)(2) or (e)(3) of this section.

(b) * * *

(5) Any designated Roth contributions described in section 402A (before applying the limits of section 402(g) or this section).

(6) Any elective employer contributions to a SIMPLE retirement account, on behalf of an employee pursuant to a qualified salary reduction arrangement as described in section 408(p)(2) (before applying the limits of section 402(g) or this section).

* * * * *

(d) *Applicable limit*—(1) *In general.* Except as provided under paragraph (d)(2) of this section, the applicable limit for an individual's taxable year is the applicable dollar amount set forth in section 402(g)(1)(B). This applicable dollar amount is increased for the taxable year beginning in 2007 and later years in the same manner as the dollar amount under section 415(b)(1)(A) is adjusted pursuant to section 415(d). See § 1.402(g)–2 for the treatment of catch-up contributions described in section 414(v).

(2) *Special adjustment for elective deferrals with respect to section 403(b) annuity contracts for certain long-term employees.* The applicable limit for an individual who is a qualified employee (as defined in section 402(g)(7)(C)) and has elective deferrals described in paragraph (b)(3) or (5) of this section for a taxable year is adjusted by increasing the applicable limit otherwise determined under paragraph (d)(1) of this section in accordance with section 402(g)(7).

(e) * * *

(2) *Correction of excess deferrals after the taxable year.* A plan may provide that if any amount is an excess deferral under paragraph (a) of this section:

(i) Not later than the first April 15 (or such earlier date specified in the plan) following the close of the individual's taxable year, the individual may notify each plan under which deferrals were made of the amount of the excess deferrals received by the plan. If any designated Roth contributions were made to a plan, the notification must also identify the extent to which, if any, the excess deferrals are comprised of designated Roth contributions. A plan may provide that an individual is deemed to have notified the plan of excess deferrals (including the portion of excess deferrals that are comprised of designated Roth contributions) to the extent the individual has excess deferrals for the taxable year calculated by taking into account only elective

deferrals under the plan and other plans of the same employer and the plan may provide the extent to which such excess deferrals are comprised of designated Roth contributions. A plan may instead provide that the employer may notify the plan on behalf of the individual under these circumstances.

(3) * * *

(i) * * *

(A) * * * If any designated Roth contributions were made to a plan, the notification must identify the extent to which, if any, the excess deferrals are comprised of designated Roth contributions. A plan may provide that an individual is deemed to have notified the plan of excess deferrals (including the portion of excess deferrals that are comprised of designated Roth contributions) for the taxable year calculated by taking into account only elective deferrals under the plan and other plans of the same employer and the plan may provide the extent to which such excess deferrals are comprised of designated Roth contributions. * * *

* * * * *

(5) *Income allocable to excess deferrals*—(i) *General rule.* The income allocable to excess deferrals is equal to the sum of the allocable gain or loss for the taxable year of the individual and, in the case of a distribution in a taxable year beginning on or after January 1, 2007, made to correct an excess deferral, to the extent the excess deferrals are or will be credited with gain or loss for the gap period (i.e., the period after the close of the taxable year and prior to the distribution) if the total account were to be distributed, the allocable gain or loss during that period.

(ii) *Method of allocating income.* * * * A plan will not fail to use a reasonable method for computing the income allocable to excess deferrals merely because the income allocable to excess deferrals is determined on a date that is no more than 7 days before the distribution.

(iii) *Alternative method of allocating taxable year income.* A plan may determine the income allocable to excess deferrals for the taxable year by multiplying the income for the taxable year allocable to elective deferrals by a fraction. The numerator of the fraction is the excess deferrals by the employee for the taxable year. The denominator of the fraction is equal to the sum of:

(A) The total account balance of the employee attributable to elective deferrals as of the beginning of the taxable year, plus

(B) The employee's elective deferrals for the taxable year.

* * * * *

(v) *Alternative method for allocating plan year and gap period income.* A plan may determine the allocable gain or loss for the aggregate of the taxable year and the gap period by applying the alternative method provided by paragraph (e)(5)(iii) of this section to this aggregate period. This is accomplished by substituting the income for the taxable year and the gap period for the income for the taxable year and by substituting the elective deferrals for the taxable year and the gap period for the elective deferrals for the taxable year in determining the fraction that is multiplied by that income.

* * * * *

(8) * * *

(iv) *Distributions of excess deferrals from a designated Roth account.* The rules of paragraph (e)(8)(iii) of this section generally apply to distributions of excess deferrals that are designated Roth contributions and the attributable income. Thus, if a designated Roth account described in section 402A includes any excess deferrals, any distribution of amounts attributable to those excess deferrals are includible in gross income (without adjustment for any return of investment in the contract under section 72(e)(8)). In addition, such distributions cannot be qualified distributions described in section 402A(d)(2) and are not eligible rollover distributions within the meaning of section 402(c)(4). For this purpose, if a designated Roth account includes any excess deferrals, any distributions from the account are treated as attributable to those excess deferrals until the total amount distributed from the designated Roth account equals the total of such deferrals and attributable income.

* * * * *

Par. 3. Sections 1.402A–1 and 1.402A–2 are added to read as follows:

§ 1.402A–1 Designated Roth Accounts

Q–1: What is a designated Roth account?

A–1: A designated Roth account is a separate account under a qualified cash or deferred arrangement under a section 401(a) plan, or under a section 403(b) plan, to which designated Roth contributions are made that satisfies the requirements of § 1.401(k)–1(f) (in the case of a section 401(a) plan) or § 1.403(b)–3(c) (in the case of a section 403(b) plan).

Q–2. How is a distribution from a designated Roth account taxed?

A–2. (a) The taxation of a distribution from a designated Roth account depends on whether or not the distribution is a qualified distribution. A qualified distribution from a designated Roth account is not includible in the distributee's gross income.

(b) Except as otherwise provided in paragraph (c) of this A–2, a qualified distribution is a distribution that is both—

(1) Made after the 5-taxable-year period of participation defined in A–4 of this section has been completed; and

(2) Made on or after the date the employee attains age 59½, made to a beneficiary or the estate of the employee on or after the employee's death, or attributable to the employee's being disabled within the meaning of section 72(m)(7).

(c) A distribution from a designated Roth account is not a qualified distribution to the extent it consists of a distribution of excess deferrals and attributable income described in § 1.402(g)–1(e). See A–11 of this section for other amounts that are not treated as qualified distributions, including excess contributions described in section 401(k)(8), or excess aggregate contributions described in section 401(m)(8), and income on any of these excess amounts.

Q–3. How is a distribution from a designated Roth account taxed if it is not a qualified distribution?

A–3. Except as provided in A–11 of this section, a distribution from a designated Roth account that is not a qualified distribution is taxable to the distributee under section 402 in the case of a plan qualified under section 401(a) and under section 403(b)(1) in the case of a section 403(b) plan. For this purpose, a designated Roth account is treated as a separate contract under section 72. Thus, except as otherwise provided in A–5 of this section for a rollover, if a distribution is before the annuity starting date, the portion of any distribution that is includible in gross income as an amount allocable to income on the contract and the portion not includible in gross income as an amount allocable to investment in the contract is determined under section 72(e)(8), treating the designated Roth account as a separate contract. Similarly, if a distribution is on or after the annuity starting date, the portion of any annuity payment that is includible in gross income as an amount allocable to income on the contract and the portion not includible in gross income as an amount allocable to investment in the contract is determined under section 72(b), treating the designated Roth account as a separate contract. For purposes of section 72, designated Roth contributions are employer contributions described in section 72(f)(1) (contributions that are includible in gross income).

Q–4. What is the 5-taxable-year period of participation described in A–2 of this section?

A–4. (a) The 5-taxable-year period of participation described in A–2 of this section for a plan is the period of 5 consecutive taxable years that begins with the first day of the first taxable year in which the employee makes a designated Roth contribution to any designated Roth account established for the employee under the same plan and ends when 5 consecutive taxable years have been completed. For this purpose, the first taxable year in which an employee makes a designated Roth contribution is the year in which the amount is includible in the employee's gross income.

(b) Generally, an employee's 5-taxable-year period of participation is determined separately for each plan (within the meaning of section 414(1)) in which the employee participates. Thus, if an employee has elective deferrals made to designated Roth accounts under two or more plans, the employee may have two or more different 5-taxable-year periods of participation, depending on when the employee first had contributions made to a designated Roth account under each plan. However, if a direct rollover contribution of a distribution from a designated Roth account under another plan is made by the employee to the plan, the 5-taxable-year period of participation begins on the first day of the employee's taxable year in which the employee first had designated Roth contributions made to such other designated Roth account, if earlier.

(c) The beginning of the 5-taxable-year period of participation is not redetermined for any portion of an employee's designated Roth account. This is true even if the employee dies or the account is divided pursuant to a qualified domestic relations order, and thus, a portion of the account is not payable to the employee and is payable to the employee's beneficiary or an alternate payee. The same rule applies if the entire designated Roth account is distributed during the 5-taxable-year period of participation and the employee subsequently makes additional designated Roth contributions under the plan.

Q–5. How do the taxation rules apply to a distribution from a designated Roth account that is rolled over?

A–5. (a) An eligible rollover distribution from a designated Roth account is permitted to be rolled over into another designated Roth account or a Roth IRA, and the amount rolled over is not currently includable in gross income. In accordance with section 402(c)(2), to the extent that a portion of a distribution from a plan qualified under section 401(a) is not includible in income (determined without regard to the rollover), if that portion of the distribution is to be rolled over into a designated Roth account, the rollover must be accomplished through a direct rollover of the entire distribution (*i.e.*, a 60 day rollover to another designated Roth account is not available for this portion of the distribution) and can only be made to another plan qualified under section 401(a) which agrees to separately account for the amount not includible in income (*i.e.*, it cannot be rolled over into a section 403(b) plan). See § 1.403(b)-7(a) for the corresponding rule applicable to section 403(b) plans. If a distribution from a designated Roth account is instead made to the employee, the employee would still be able to roll over the entire amount (or any portion thereof) into a Roth IRA within the 60-day period described in section 402(c)(3).

(b) In the case of an eligible rollover distribution from a designated Roth account that is not a qualified distribution, if the entire amount of the distribution is not rolled over, the part that is rolled over is deemed to consist first of the portion of the distribution that is attributable to income under section 72(e)(8).

(c) If an employee receives a distribution from a designated Roth account, the portion of the distribution that would be includible in gross income is permitted to be rolled over into a designated Roth account under another plan. In such a case, § 1.402A–2, A–3, provides for additional reporting by the recipient plan. In addition, the employee's period of participation under the distributing plan is not carried over to the recipient plan for purposes of satisfying the 5-taxable-year period of participation requirement under the recipient plan.

(d) The following example illustrates the application of this A–5—

Example. Employee B receives a $14,000 eligible rollover distribution that is not a qualified distribution from B's designated Roth account, consisting of $11,000 of investment in the contract and $3,000 of income. Within 60 days of receipt, Employee B rolls over $7,000 of the distribution into a Roth IRA. The $7,000 is deemed to consist of $3,000 of income and $4,000 of investment in the contract. Because the only portion of the distribution that could be includible in gross income (the income) is rolled over, none of the distribution is includible in Employee B's gross income.

(e) This A–5 applies for taxable years beginning on or after January 1, 2006.

Q–6. In the case of a rollover contribution to a designated Roth account, how is the amount that is treated as investment in the contract under section 72 determined?

A–6. If the entire amount of a distribution from a designated Roth account is rolled over to another designated Roth account, the amount of the rollover contribution allocated to investment in the contract in the recipient designated Roth account is the amount that would not have been includible in gross income (determined without regard to section 402(e)(4)) if the distribution had not been rolled over. Thus, if an amount that is a qualified distribution is rolled over, the entire amount of the rollover contribution is allocated to investment in the contract. If less than the entire amount of a distribution is rolled over, A–5(b) of this section provides a rule for determining the portion of the rollover contribution treated as investment in the contract.

Q–7. After a qualified distribution from a designated Roth account has been made, how is the remaining investment in the contract of the designated Roth account determined under section 72?

A–7. (a) The portion of any qualified distribution that is treated as a recovery of investment in the contract is determined in the same manner as if the distribution were not a qualified distribution. (See A 3 of this section) Thus, the remaining investment in the contract in a designated Roth account after a qualified distribution is determined in the same manner after a qualified distribution as it would be determined if the distribution were not a qualified distribution.

(b) The following example illustrates the application of this A–7—

Example. Employee C receives a $12,000 distribution, which is a qualified distribution that is attributable to the employee being disabled within the meaning of section 72(m)(7), from C's designated Roth account. Immediately prior to the distribution, the account consisted of $21,850 of investment in the contract (*i.e.*, designated Roth contributions) and $1,150 of income. For purposes of determining recovery of investment in the contract under section 72, the distribution is deemed to consist of $11,400 of investment in the contract [$12,000 × 21,850/(1,150 + 21,850)], and $600 of income [$12,000 × 1,150/(1,150 + 21,850)]. Immediately after the distribution, C's designated Roth account consists of $10,450 of investment in the contract and $550 of income. This determination of the remaining investment in the contract will be needed if C subsequently is no longer disabled and takes a nonqualified distribution from the designated Roth account.

Q–8. What is the relationship between the accounting for designated Roth contributions as investment in the contract for purposes of section 72 and their treatment as elective deferrals available for a hardship distribution under section 401(k)(2)(B)?

A–8. (a) There is no relationship between the accounting for designated Roth contributions as investment in the contract for purposes of section 72 and their treatment as elective deferrals available for a hardship distribution under section 401(k)(2)(B). A plan that makes a hardship distribution under section 401(k)(2)(B) from elective deferrals that includes designated Roth contributions must separately determine the amount of elective deferrals available for hardship and the amount of investment in the contract attributable to designated Roth contributions for purposes of section 72. Thus, the entire amount of a hardship distribution is treated as reducing the otherwise maximum distributable amount for purposes of applying the rule in section 401(k)(2)(B) and § 1.401(k)–1(d)(3)(ii) that generally limits hardship distributions to the principal amount of elective deferrals made less the amount of elective deferrals previously distributed from the plan, even if a portion of the distribution is treated as income under section 72(e)(8).

(b) The following example illustrates the application of this A–8—

Example. Assume the same facts as in the *Example* in A–7 of this section, except that Employee C is not disabled, the distribution is a hardship distribution, and Employee C has received no previous distributions of elective deferrals from the plan. The adjustment to the investment in the contract is the same as in A–7 of this section, but for purposes of determining the amount of elective deferrals available for future hardship distribution, the entire amount of the distribution is subtracted from the maximum distributable amount. Thus, Employee C has only $9,850 ($21,850 − $12,000) available for hardship distribution from C's designated Roth account.

Q–9. Can an employee have more than one separate contract for designated Roth contributions under a plan qualified under section 401(a) or a section 403(b) plan?

A–9. (a) Except as otherwise provided in paragraph (b) of this A–9, for purposes of section 72, there is only one separate contract for an employee with respect to the designated Roth contributions under a plan. Thus, if a plan maintains one separate account for designated Roth contributions made under the plan and another separate account for rollover contributions received from a designated Roth account under another plan (so that the rollover account is not required to be subject to the distribution restrictions otherwise applicable to the account consisting of designated Roth contributions made under the plan), both separate accounts are considered to be one contract for purposes of applying section 72 to the distributions from either account.

(b) If a separate account with respect to an employee's accrued benefit consisting of designated Roth contributions is established and maintained for an alternate payee pursuant to a qualified domestic relations order and another designated Roth account is maintained for the employee, each account is treated as a separate contract for purposes of section 72. The alternate payee's designated Roth account is also a separate contract for purposes of section 72 with respect to any other account maintained for that alternate payee. Similarly, if separate accounts are established and maintained for different beneficiaries after the death of an employee, the separate account for each beneficiary is treated as a separate contract under section 72 and is also a separate contract with respect to any other account maintained for that beneficiary under the plan that is not a designated Roth account. When the separate account is established for an alternate payee or for a beneficiary (after an employee's death), each separate account must receive a proportionate amount attributable to investment in the contract.

Q–10. What is the tax treatment of employer securities distributed from a designated Roth account?

A–10. (a) If a distribution of employer securities from a designated Roth account is not a qualified distribution, section 402(e)(4)(B) applies. Thus, in the case of a lump-sum distribution that includes employer securities, unless the taxpayer elects otherwise, net unrealized appreciation attributable to the employer securities is not includible in gross income; and such net unrealized appreciation is not included in the basis of the distributed securities and is capital gain to the extent such appreciation is realized in a subsequent taxable transaction.

(b) In the case of a qualified distribution of employer securities from a designated Roth account, the distributee's basis in the distributed securities for purposes of subsequent disposition is their fair market value at the time of distribution.

Q–11. Can an amount described in A–4 of § 1.402(c)–2 with respect to a designated Roth account be a qualified distribution?

A–11. No. An amount described in A–4 of § 1.402(c)–2 with respect to a designated Roth account cannot be a qualified distribution. Such an amount is taxable under the rules of §§ 1.72–16(b), 1.72(p)–1, A–11 through A–13, 1.402(g)–1(e)(8), 1.401(k)–2(b)(2)(vi), 1.401(m)–2(b)(2)(vi), or 1.404(k)–1T. Thus, for example, loans that are treated as deemed distributions pursuant to section 72(p), or dividends paid on employer securities as described in section 404(k) are not qualified distributions even if the deemed distributions occur or the dividends are paid after the employee attains age 59½ and the 5-taxable-year period of participation defined in A–4 of this section has been satisfied. However, if a dividend is reinvested in accordance with section 404(k)(2)(A)(iii)(II), the amount of such a dividend is not precluded from being a qualified distribution if later distributed.

Q–12. If any amount from a designated Roth account is included in a loan to an employee, do the plan aggregation rules of section 72(p)(2)(D) apply for purposes of determining the total amount an employee is permitted to borrow from the plan, even though the designated Roth account generally is treated as a separate contract under section 72?

A–12. Yes. If any amount from a designated Roth account is included in a loan to an employee, notwithstanding the general rule that the designated Roth account is treated as a separate contract under section 72, the plan aggregation rules of section 72(p)(2)(D) apply for purposes of determining the maximum amount the employee is permitted to borrow from the plan and such amount is based on the total of the designated Roth contributions amounts and the other amounts under the plan, regardless of whether the loan is from the designated Roth account or other accounts under the plan. However, to the extent a loan is from a designated Roth account, the repayment requirement of section 72(p)(2)(C) must be satisfied separately with respect to that portion of the loan and with respect to the portion of the loan from other accounts under the plan.

Q–13. Does a transaction or accounting methodology involving an employee's designated Roth account and any other accounts under the plan or plans of an employer that has the effect of transferring value from the other accounts into the designated Roth account violate the separate accounting requirement of section 402A?

A–13. Yes. Any transaction or accounting methodology involving an employee's designated Roth account

and any other accounts under the plan or plans of an employer that has the effect of directly or indirectly transferring value from another account into the designated Roth account violates the separate accounting requirement under section 402A. However, any transaction that merely exchanges investments between accounts at fair market value will not violate the separate accounting requirement. This A–13 applies to designated Roth accounts for taxable years beginning on or after January 1, 2006.

Q–14. When is section 402A and this § 1.402A–1 applicable?

A–14. Section 402A is applicable for taxable years beginning on or after January 1, 2006. Except as otherwise provided in A–5 and A–13 of this section, the rules of this § 1.402A–1 apply for taxable years beginning on or after January 1, 2007.

§ 1.402A–2 Reporting and recordkeeping requirements with respect to designated Roth accounts.

Q–1. Who is responsible for keeping track of the 5-taxable-year period of participation and the investment in the contract, *i.e.*, the amount of unrecovered designated Roth contributions for the employee?

A–1. The plan administrator or other responsible party with respect to a plan with a designated Roth account is responsible for keeping track of the 5-taxable-year period of participation for each employee and the amount of investment in the contract (unrecovered designated Roth contributions) on behalf of such employee. For purposes of the preceding sentence, in the absence of actual knowledge to the contrary, the plan administrator or other responsible party is permitted to assume that an employee's taxable year is the calendar year. In the case of a direct rollover from another designated Roth account, the plan administrator or other responsible party of the recipient plan can rely on reasonable representations made by the plan administrator or responsible party with respect to the plan with the other designated Roth account. See A–2 of this section for statements required in the case of rollovers.

Q–2. In the case of an eligible rollover distribution from a designated Roth account, what additional information must be provided with respect to such distribution?

A–2. (a) Pursuant to section 6047(f), if an amount is distributed from a designated Roth account, the plan administrator or other responsible party with respect to the plan must provide a statement as described below in the following situations—

(1) In the case of a direct rollover of a distribution from a designated Roth account under a plan to a designated Roth account under another plan, the plan administrator or other responsible party must provide to the plan administrator or responsible party of the recipient plan either a statement indicating the first year of the 5-taxable-year period described in A–1 of this section and the portion of the distribution that is attributable to investment in the contract under section 72, or a statement that the distribution is a qualified distribution.

(2) If the distribution is not a direct rollover to a designated Roth account under another plan, the plan administrator or responsible party must provide to the employee, upon request, the same information described in paragraph (a)(1) of this A–2, except the statement need not indicate the first year of the 5-taxable-year period described in A–1 of the section.

(b) The statement described in paragraph (a) of this A–2 must be provided within a reasonable period following the direct rollover or distributee request but in no event later than 30 days following the direct rollover or distributee request.

Q–3. If a plan qualified under section 401(a) or a section 403(b) plan accepts a 60-day rollover of earnings from a designated Roth account, what report to the IRS must be provided with respect to such rollover contribution?

A–3. A plan qualified under section 401(a), or a section 403(b) plan, accepting a rollover contribution (other than a direct rollover contribution) under section 402(c)(2), or section 403(b)(8)(B), of the portion of a distribution from a designated Roth account that would have been includable in gross income must notify the Commissioner of its acceptance of the rollover contribution no later than the due date for filing Form 1099–R, ''Distributions From Pensions, Annuities, Retirement or Profit-Sharing Plans, IRA, Insurance Contracts.'' The notification is required to be sent to an address to be specified by the Commissioner and must include the employee's name and social security number, the amount rolled over, the year in which the rollover contribution was made, and such other information as the Commissioner, in revenue rulings, notices, or other published guidance in the Internal Revenue Bulletin (see § 601.601(d)(2) of this chapter) may require in order to determine that the amount rolled over is a valid rollover contribution.

Q–4. When is this § 1.402A–2 applicable?

A–4. The rules of this § 1.402A–2 are applicable for taxable years beginning on or after January 1, 2007.

Par. 4. Section 1.403(b)–2, as set forth in Paragraph 5 of the 2004 section 403(b) proposed regulations (69 FR 67075) is amended by revising paragraph (a)(17) to read as follows:

§ 1.403(b)–2 Definitions.

(a) * * *

(17) *Section 403(b) elective deferral; designated Roth contribution*—(i) *Section 403(b) elective deferral* means an elective deferral that is an employer contribution to a section 403(b) plan for an employee. See § 1.403(b)–5(b) for additional rules with respect to a section 403(b) elective deferral.

(ii) *Designated Roth contribution* under a section 403(b) plan means a section 403(b) elective deferral that satisfies § 1.403(b)–3(c).

* * * * *

Par. 5. Section 1.403(b)–3, as set forth in paragraph 5 of the 2004 section 403(b) proposed regulations (69 FR 67075) is amended to read as follows:

1. A sentence is added to the end of paragraph (a) introductory text.

2. Paragraph (c) is redesignated as paragraph (d) and a new paragraph (c) is added.

§ 1.403(b)–3 Exclusion for contributions to purchase section 403(b) contracts.

(a) *Exclusion for section 403(b) contracts.* * * * However, the preceding two sentences do not apply to designated Roth contributions; see paragraph (c) of this section and § 1.403(b)–7(e) for special taxation rules that apply with respect to designated Roth contributions under a section 403(b) plan.

* * * * *

(c) *Special rules for designated Roth contributions.* (1) The rules of § 1.401(k)–1(f)(1) and (2) for designated Roth contributions under a qualified cash or deferred arrangement apply to designated Roth contributions under a section 403(b) plan. Thus, a designated Roth contribution under a section 403(b) plan is a section 403(b) elective deferral that is designated irrevocably by the employee at the time of the cash or deferred election as a designated Roth contribution that is being made in lieu of all or a portion of the section 403(b) elective deferrals the employee is otherwise eligible to make under the plan; that is treated by the employer as includible in the employee's gross income at the time the employee would have received the amount in cash if the employee had not made the cash or

deferred election (*e.g.*, by treating the contributions as wages subject to applicable withholding requirements); and that is maintained in a separate account (within the meaning of § 1.401(k)–1(f)(2)).

(2) A designated Roth contribution under a section 403(b) plan must satisfy the requirements applicable to section 403(b) elective deferrals. Thus, for example, designated Roth contributions under a section 403(b) plan must satisfy the requirements of § 1.403(b)–6(d). Similarly, a designated Roth account under a section 403(b) plan is subject to the rules of section 401(a)(9)(A) and (B) and § 1.403(b)–6(e).

* * * * *

Par. 6. Section 1.403(b)–5, as set forth in paragraph 5 of the 2004 section 403(b) proposed regulations (69 FR 67075), is amended by adding a sentence to the end of paragraph (b)(1) to read as follows:

§ 1.403(b)–5 Nondiscrimination rules.

* * * * *

(b) * * *

(1) * * * Further, the employee's right to make elective deferrals also includes the right to designate section 403(b) elective deferrals as designated Roth contributions.

* * * * *

Par. 7. Section 1.403(b)–7, as set forth in paragraph 5 of the 2004 section 403(b) proposed regulations (69 FR 67075), is amended as follows:

1. A sentence is added before the last sentence in paragraph (b)(1).

2. A sentence is added before the last sentence in paragraph (b)(2)

3. A paragraph (e) is added.

The additions are to read as follows:

§ 1.403(b)–7 Taxation of distributions and benefits

* * * * *

(b) * * *

(1) * * * Thus, to the extent that a portion of a distribution (including a distribution from a designated Roth account) would be excluded from gross income if it were not rolled over, if that portion of the distribution is to be rolled over into an eligible retirement plan that is not an IRA, the rollover must be accomplished through a direct rollover of the entire distribution (*i.e.*, a 60-day rollover to another section 403(b) plan is not available for this portion of the distribution) to a section 403(b) plan that agrees to separately account for the amount not includible in income (*i.e.*, it cannot be rolled over into a plan qualified under section 401(a)). * * *

(2) * * * Thus, the special rule in § 1.401(k)–1(f)(3)(ii) with respect to distributions from a designated Roth account that are expected to total less than $200 during a year applies to designated Roth accounts under a section 403(b) plan. * * *

* * * * *

(e) *Special rules relating to distributions from a designated Roth account.* If an amount is distributed from a designated Roth account under a section 403(b) plan, the amount, if any, that is includible in gross income and the amount, if any, that may be rolled over to another section 403(b) plan is determined under § 1.402A–1. Thus, the designated Roth account is treated as a separate contract for purposes of section 72. For example, the rules of section 72(b) must be applied separately to annuity payments with respect to a designated Roth account under a section 403(b) plan and separately to annuity payments with respect to amounts attributable to any other contributions to the section 403(b) plan.

Par. 8. Section 1.408A–10 is added to read as follows:

§ 1.408A–10 Coordination between designated Roth accounts and Roth IRAs

Q–1. Can an eligible rollover distribution, within the meaning of section 402(c)(4), from a designated Roth account as defined in A–1 of § 1.402A–1, be rolled over to a Roth IRA?

A–1. Yes. An eligible rollover distribution, within the meaning of section 402(c)(4), from a designated Roth account may be rolled over to a Roth IRA. For purposes of this section, designated Roth account means a designated Roth account as defined in A–1 of § 1.402A–1.

Q–2. Can an eligible rollover distribution from a designated Roth account be rolled over to a Roth IRA even if the distributee is not otherwise eligible to make regular or conversion contributions to a Roth IRA?

A–2. Yes. An individual may establish a Roth IRA and rollover an eligible rollover distribution from a designated Roth account to that Roth IRA even if such individual is not eligible to make regular contributions or conversion contributions (as described in section 408A(c)(2) and (d)(3), respectively) because of the modified adjusted gross income limits in section 408A(b)(3).

Q–3. For purposes of the ordering rules on distributions from Roth IRAs, what portion of a distribution from a rollover contribution from a designated Roth account is treated as contributions?

A–3. Under section 408A(d)(4), distributions from Roth IRAs are deemed to consist first of regular contributions, then of conversion contributions, and finally, of earnings. For purposes of section 408A(d)(4), the amount of a rollover contribution that is treated as a regular contribution is the portion of the distribution that is treated as investment in the contract under A–6 of § 1.402A–1, and the remainder of the rollover contribution is treated as earnings. Thus, the entire amount of any qualified distribution from a designated Roth account that is rolled over into a Roth IRA is treated as a regular contribution to the Roth IRA. Accordingly, a subsequent distribution from the Roth IRA in the amount of that rollover contribution is not includible in gross income under the rules of A–8 of § 1.408A–6.

Q–4. In the case of a rollover from a designated Roth account to a Roth IRA, when does the 5-taxable-year period (described in section 408A(d)(2)(B) and A–1 of § 1.408A–6) for determining qualified distributions from a Roth IRA begin?

A–4. (a) The 5-taxable-year period for determining a qualified distribution from a Roth IRA (described in section 408A(d)(2)(B) and A–1 of § 1.408A–6) begins with the earlier of the taxable year described in A–2 of § 1.408A–6 or the taxable year in which a rollover contribution from a designated Roth account is made to a Roth IRA. The 5-taxable-year period described in this A–4 and the 5-taxable-year period of participation described in A–4 of § 1.402A–1 are determined independently.

(b) The following examples illustrate the application of this A–4—

Example 1. Employee D, who is over age 59½, takes a distribution from D's designated Roth account in 2008, prior to the end of the 5-taxable-year period of participation used to determine qualified distributions from a designated Roth account. The distribution is an eligible rollover distribution and D rolls it over in accordance with sections 402(c) and 402A(c)(3) to D's Roth IRA, which was established in 2003 (*i.e.*, established for more than 5 years). Any subsequent distribution from the Roth IRA of the amount rolled in, plus earnings thereon, would not be includible in gross income (because it would be a qualified distribution within the meaning of section 408A(d)(2)).

Example 2. Assume the facts are the same as in *Example 1* except that the Roth IRA is D's first Roth IRA and is established with the rollover in 2008, which is the only contribution made to the Roth IRA. If a distribution is made from the Roth IRA prior to the end of the 5-taxable-year period used to determine qualified distributions from a Roth IRA (which begins in 2008, the year of the rollover which established the Roth IRA) the distribution would not be a qualified distribution within the meaning of section 408A(d)(2), and any amount of the distribution that exceeded the portion of the

rollover contribution that consisted of investment in the contract is includible in D's gross income.

Example 3. Assume the facts are the same as in *Example 2* except that the distribution from the designated Roth account is after the end of the 5-taxable-year period of participation used to determine qualified distributions from a designated Roth account. If a distribution is made from the Roth IRA prior to the expiration of the 5-taxable-year period used to determine qualified distributions from a Roth IRA, the distribution would not be a qualified distribution within the meaning of section 408A(d)(2), and any amount of the distribution that exceeded the amount rolled in is includible in D's gross income.

Q–5. Can amounts distributed from a Roth IRA be rolled over to a designated Roth account as defined in A–1 of § 1.402A–1?

A–5. No. Amounts distributed from a Roth IRA may be rolled over or transferred only to another Roth IRA and are not permitted to be rolled over to a designated Roth account under a section 401(a) or section 403(b) plan. The same rule applies even if all the amounts in the Roth IRA are attributable to a rollover distribution from a designated Roth account in a plan.

Q–6. When is this § 1.408A–10 applicable?

A–6. The rules of § 1.408A–10 apply for taxable years beginning on or after January 1, 2006.

Mark E. Matthews,

Deputy Commissioner for Services and Enforcement.

[FR Doc. E6–945 Filed 1–25–06; 8:45 am]

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DEPARTMENT OF LABOR

Mine Safety and Health Administration

30 CFR Part 57

RIN 1219–AB29

Diesel Particulate Matter Exposure of Underground Metal and Nonmetal Miners

AGENCY: Mine Safety and Health Administration (MSHA), Labor.

ACTION: Proposed rule; extension of comment period; close of record.

SUMMARY: The Mine Safety and Health Administration is extending the period for comment on the proposed rule entitled ''Diesel Particulate Matter Exposure of Underground Metal and Nonmetal Miners (DPM),'' published in the **Federal Register** on September 7, 2005 (70 FR 53280).

DATES: We must receive your comments by February 17, 2006.

ADDRESSES: (1) To submit comments, please include RIN: 1219–AB29 in the subject line of the message and send them to us at either of the following addresses.

Federal e-Rulemaking portal: Go to *http://www.regulations.gov* and follow the online instructions for submitting comments.

E-mail: *zzMSHA-comments@dol.gov*. If you are unable to submit comments electronically, please identify them by RIN: 1219–AB29 and send them to us by any of the following methods.

- Fax: 202–693–9441.
- Mail to: MSHA, Office of Standards, Regulations, and Variances, 1100 Wilson Blvd., Rm. 2350, Arlington, VA 22209–3939.
- Hand delivery or courier to: MSHA, 1100 Wilson Blvd., Receptionist, 21st floor, Arlington, VA 22209–3939.

(2) We will post all comments on the Internet without change, including any personal information they may contain. You may access the rulemaking docket via the Internet at *http://www.msha.gov/regsinfo.htm* or in person at MSHA's public reading room at 1100 Wilson Blvd., Rm. 2349, Arlington, VA.

FOR FURTHER INFORMATION CONTACT: Robert F. Stone, Acting Director, Office of Standards, Regulations and Variances, at (202) 693–9440.

SUPPLEMENTARY INFORMATION:

I. Background

On September 7, 2005, the Mine Safety and Health Administration (MSHA) proposed a rule to phase in the final DPM limit because we are concerned that there may be feasibility issues for some mines to meet that limit by January 20, 2006.

Accordingly, we proposed a five-year phase-in period and noted our intent to initiate a separate rulemaking to convert the final DPM limit from a total carbon limit to an elemental carbon limit. We set hearing dates and a deadline for receiving comments on the September 7, 2005 proposed rule with the expectation that we would complete the rulemaking to phase in the final DPM limit before January 20, 2006.

After publication of the September 7, 2005 proposed rule, we received a request from the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (USW) for more time to comment on the proposed rule. The USW explained that Hurricane Katrina had placed demands on their resources that would prevent them from participating effectively in the rulemaking under the current schedule for hearings and comments. We recognized the USW's need to devote resources to respond to the aftermath of Hurricane Katrina and the impact that would have on their participation under the current timetable. We also received a request from the National Stone, Sand and Gravel Association (NSSGA) for additional time to comment on the proposed rule and for an additional public hearing in Arlington, Virginia.

Accordingly, due to requests from the USW and NSSGA, we published a notice on September 19, 2005 (70 FR 55018) that changed the public hearing dates from September 2005 to January 2006. We also extended the public comment period from October 14, 2005 to January 27, 2006. Public hearings were held on the proposed rule in Arlington, Virginia on January 5, 2006; Salt Lake City, Utah on January 9, 2006; Kansas City, Missouri on January 11, 2006; and Louisville, Kentucky on January 13, 2006. The rulemaking record was scheduled to close on January 27, 2006.

II. Extension of Comment Period

Recently, the National Mining Association and the Methane Awareness Resource Group (MARG) Diesel Coalition requested that the comment period be extended an additional 30 days beyond January 27, 2006 to allow for more time to prepare their comments. Additionally, we received a request from the National Institute for Occupational Safety and Health for a three week extension. We have determined that a three week extension of the comment period is sufficient to allow additional public comment on the proposed rule. Therefore, all post-hearing comments must be received on or before the close of the record on February 17, 2006.

List of Subjects in 30 CFR Part 57

Diesel particulate matter, Metal and nonmetal, Mine safety and health, Underground miners.

Dated: January 24, 2006.

Robert M. Friend,

Acting Deputy Assistant Secretary of Labor for Mine Safety and Health.

[FR Doc. 06–803 Filed 1–25–06; 8:45 am]

BILLING CODE 4510–43–P

DEPARTMENT OF DEFENSE

Office of the Secretary

32 CFR Part 204

[DoD–2006–OS–0005]

RIN 0790–AH93

User Charges

AGENCY: Department of Defense.

ACTION: Proposed rule.

SUMMARY: The Department of Defense is revising 32 CFR Part 204 to better align it with OMB Circular A–25, ''User Charges.'' This part provides guidelines to establish appropriate charges for authorized services supplied by Department of Defense organizations when such services provide special benefits to an identifiable recipient beyond those that accrue to the general public.

DATES: Comments must be received by March 27, 2006.

ADDRESSES: You may submit comments, identified by docket number and or RIN number and title, by any of the following methods:

- Federal eRulemaking Portal: *http://www.regulations.gov.* Follow the instructions for submitting comments.
- Mail: Federal Docket Management System Office, 1160 Defense Pentagon, Washington, DC 20301–1160.

Instructions: All submissions received must include the agency name and docket number or Regulatory Information Number (RIN) for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: Mr. T. Summers, 706–697–3193.

SUPPLEMENTARY INFORMATION:

Executive Order 12866, ''Regulatory Planning and Review''

It has been determined that 32 Code of Federal Regulations (CFR) Part 204 is not a significant regulatory action. The rule does not:

(1) Have an annual effect to the economy of $100 million or more or adversely affect, in a material way, the economy; a section of the economy; productivity; competition; jobs; the environment; public health or safety; or State, local, or tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another Agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive Order.

Unfunded Mandates Reform Act (Sec. 202, Pub. L. 104–4)

It has been certified that this rule does not contain a Federal mandate that may result in the expenditure by State, local and tribal governments, in aggregate, or by the private sector, of $100 million or more in any one year.

Public Law 96–354, ''Regulatory Flexibility Act'' (5 U.S.C. 601)

It has been certified that 32 CFR part 204 is not subject to the Regulatory flexibility Act (5 U.S.C. 601) because it would not, if promulgated, have a significant economic impact on a substantial number of small entities. The rule being promulgated provides guidelines to establish appropriate charges for authorized services supplied by Department of Defense organizations when such services provide special benefits to an identifiable recipient beyond those that accrue to the general public.

Public Law 96–511, ''Paperwork Reduction Act'' (44 U.S.C. Chapter 35)

It has been certified that 32 CFR Part 204 does not impose any reporting or recordkeeping requirements under the Paperwork Reduction Act of 1995.

Executive Order 13132, ''Federalism''

It has been certified that this rule does not have federalism implications, as set forth in Executive Order 13132. This rule does not have substantial direct effects on:

(1) The States;

(2) The relationship between the National Government and the States; or

(3) The distribution of power and responsibilities among the various levels of government.

List of Subjects in 32 CFR Part 204

Accounting, Armed forces, Government property.

Accordingly, 32 CFR Part 204 is proposed to be revised to read as follows:

PART 204—USER CHARGES

Sec.

Authority: 31 U.S.C. 9701.

§ 204.1 Purpose.

This part implements the Department of Defense (DoD) program under Title 31, United States Code, section 9701 and Office of Management and Budget (OMB) Circular No. A–25, ''User Charges,'' to establish appropriate charges for authorized services supplied by DoD organizations.

§ 204.2 Applicability.

This part applies to the Office of the Secretary of Defense, the Military Departments, the Chairman of the Joint Chiefs of Staff, the Combatant Commands, and the Defense Agencies (hereafter referred to collectively as ''Dod Components''). None of the provisions in this part should be construed as giving authority for the sale or lease of property, or the rendering of special services. Actions to convey such special benefits must be authorized by separate authority. This user charge policy is applicable except when other statutes or directives specifically direct other practices or procedures.

§ 204.3 Policy and procedures.

(a) *General.* It is DoD policy not to compete unfairly with available commercial facilities in providing special services or in the sale or lease of property to private parties and agencies outside the Federal Government. However, when a service (or privilege) provides special benefits to an identifiable recipient, beyond those that accrue to the general public, a charge shall be imposed (to recover the full cost to the Federal Government for providing the special benefit, or the market price), except as otherwise approved by the Under Secretary of Defense (Comptroller) and authorized by the Director of the OMB. A special benefit will be considered to accrue, and a user charge shall be imposed, when a Government service:

(1) Enables the beneficiary to obtain more immediate or substantial gain or values (which may or may not be measurable in monetary terms) than those which accrue to the general public; or

(2) Provides business stability or contributes to public confidence in the business activity of the beneficiary (e.g., insuring deposits in commercial banks), or

(3) Is performed at the request of or for the convenience of the recipient, and is beyond the services regularly received by other members of the same industry or group or by the general public (e.g., receiving a passport, visa, airman's certificate, or a Custom's inspection after regular duty hours).

(b) *Costing.* (1) Except as provided in § 204.3(c) and § 204.8, a user charge shall be imposed to recover the full cost to the Federal Government of providing the service, resource, or good when the Government is acting in its capacity as sovereign.

(2) User charges shall be based on market prices (as defined in § 204.5(a)(4)) when the Government is not acting in its capacity as sovereign and is leasing or selling goods or resources, or is providing a service (e.g., leasing space in federally owned buildings). Under these business-type conditions, user charges need not be limited to the recovery of full cost and may yield net revenues.

(3) User charges will be collected in advance of, or simultaneously with, the rendering of services unless appropriations and authority are provided in advance to allow reimbursable services.

(4) Whenever possible, charges should be set as rates rather than fixed dollar amounts in order to adjust for changes in costs to the Government or changes in market prices of the good, resource, or service provided.

(c) *Exclusions* (1) The provisions of this part to not apply when other statutes or DoD issuances require different practices or procedures, such as for:

(i) Morale, welfare, and recreation services to military personnel and civilian employees of the Department of Defense and other services provided according to § 204.8.

(ii) Sale or disposal of surplus property under approved programs (Chapter 5 of DoD 7000.14–R [1]).

(iii) Services furnished the general public relating to, or in furtherance of, the Armed Forces recruiting program.

(iv) Services furnished to representatives of the public information media in the interest of public understanding of the Armed Forces.

(v) Armed Forces participation in public events. Charges for such participation are governed by the provisions of DoD Instruction 5410.19.[2]

(vi) Records made available to the public, under the Freedom of Information Act, pursuant to DoD Directive 5400.7.[3] Charges for such record searches and copies of records are governed by Chapter 6 of DoD 5400.7d–R.[4]

(vii) Services furnished to non-Federal audio-visual media. Charges for such services are governed by the provisions of DoD Instruction 5410.15.[5]

(viii) Government-developed computer programs released to non-Federal customers. Charges for software packages are governed by DoD Instruction 7930.2.[6]

(ix) Pricing of performance by DoD Working Capital Fund activities which shall be according to Volume 11B of DoD 7000.14–R.

(x) Foreign Military Sales of Defense articles and services which shall be according to Volume 15 of DoD 7000.14–R.

(xi) Records made available to Privacy Act requesters shall be according to DoD Directive 5400.11 [7] and DoD 5400.11–R.[8]

(2) User charges may be waived by the Head of a DoD Component when:

(i) Furnishing of their service without charge is an appropriate courtesy to a foreign government or international organization, or comparable fees are set on a reciprocal basis with a foreign country.

(ii) The Director of the OMB has approved a request for an exception. Such exceptions may be recommended when:

(A) The cost of collecting the fees would represent an unduly large part of the receipts from the activity; or

(B) Any other conditions exists that, in the opinion of the Head of the DoD Component of his designee, justifies the exception.

§ 204.4 Responsibilities.

(a) The USD(C) shall develop and monitor policies governing user charges.

(b) The Heads of the DoD Components, or designees, shall:

(1) Identify each service or activity that may properly be the subject of a user charge under this part.

(2) Determine the extent of the special benefit provided.

(3) Apply the principles specified in § 204.5(a) in determining full cost or market price.

(4) Review the user charges biennially, to include:

(i) Assurance that existing charges are adjusted to reflect unanticipated changes in costs or market values; and

(ii) A review of all other programs to determine whether fees should be assessed for Government services or the user of Government goods or services. DoD Components should discuss the results of the annual review of user fees and any resultant proposals in the Chief Financial Officers Annual Report required by the Chief Financial Officers Act of 1990.

(5) Initiate exception actions outlined in § 204.3(c)(2). All such actions shall be coordinated with the USD(C) prior to forwarding to the OMB.

(i) Exceptions granted under § 204.3(c)(2)(i) shall be renewed every four years to ensure that conditions warrant their continuation.

(ii) Exceptions granted under § 204.3(c)(2)(ii) shall be resubmitted for approval to the OMB every 4 years when conditions warrant their continuation.

(6) Maintain readily accessible records of:

(i) The services or activities covered by this part.

(ii) The extent of special services provided.

(iii) The exceptions to the general policy of this part.

(iv) The information used to establish charges and the specific methods used in their determination.

(v) The collections from each user charge imposed.

(7) Maintain adequate records of the information used to establish charges and provide them upon request to OMB for the evaluation of the schedules and provide data on user charges to OMB according to the requirements in Circular No. A–11.

(8) Develop legislative proposals as outlined in § 204.7 when they are statutory prohibitions or limitations on the assessment of user charges.

§ 204.5 Charges and fees.

(a) *General.* (1) All charges and fees shall be based on total cost to the U.S. Government or market price, whichever applies.

(2) ''Full cost'' includes all direct and indirect costs associated with providing a good, resource, or service. These costs are outlined in Volume 11A, Chapter 1, paragraph 010203 of DoD 7000.14–R).

(3) Full cost shall be determined or estimated from the best available records, and new cost accounting systems shall not be established solely for this purpose.

(4) ''Market price'' means the price for a good, resource, or service that is based on competition in open markets, and

[1] Copies may be obtained at *http://www.dtic.mil/whs/directives/.*

[2] See footnote 1 to § 204.3(c)(1)(ii).

[3] See footnote 1 to § 204.3(c)(1)(ii).

[4] See footnote 1 to § 204.3(c)(1)(ii).

[5] See footnote 1 to § 204.3(c)(1)(ii).

[6] See footnote 1 to § 204.3(c)(1)(ii).

[7] See footnote 1 to § 204.3(c)(1)(ii).

[8] See footnote 1 to § 204.3(c)(1)(ii).

creates neither a shortage nor a surplus of the good, resource, or service.

(i) When a substantial competitive demand exists for a good, resource, or service, its market price will be determined using commercial practices, for example:

(A) By competitive bidding; or

(B) By reference to prevailing prices in competitive markets for goods resources, or services that are the same or similar to those provided by the Government (e.g., campsites or grazing lands in the general vicinity of private ones) with adjustments as appropriate that reflect demand, level of service, and quality of the good or service.

(ii) In the absence of substantial competitive demand, market price will be determined by taking into account the prevailing prices for goods resources, or services that are the same or substantially similar to those provided by the Government, and then adjusting the supply made available and/or price of the good, resource, or service so that there will be nether a shortage nor a surplus (e.g., campsites in remote areas).

(5) Charges and fees established in advance of performance shall be based on the estimated cost of performance Projected amounts shall be reviewed biennially or whenever significant changes in cost or value occur.

(6) Management controls (see DoD Directive 5010.38 [9]) must be established to ensure that charges and fees are developed and adjusted, using current, accurate, and complete data, to provide reimbursement conforming to statutory requirements. These controls also must ensure compliance with cash management and debt collection policies according to Volume 5 of DoD 7000.14–R.

(b) *Information resources.* These charges for services provided by data processing activities shall be determined by using the costs accumulated pursuant to requirements in OMB Circular A–130, ''Management of Federal Information Resources.''

(c) User fees for recurring services shall be established in advance, when feasible.

(d) *Lease or sale of property.* Charges for lease or sale of property shall be based on the following:

(1) *Leases of military equipment or real estate.* (i) In cases involving the lease or rental of military equipment, when there is no commercial counterpart, the charge will be based on the procedures attached in Volume 11A, Chapter 1, paragraph 010203.I of DoD 7000.14–R. The current interest rate in OMB Circular A–94 will be used in the computation of interest on investment in assets. In determining the value, consideration may be given to the responsibility of the lessee to assume the risk of loss or damage to the property and to held the government harmless against claims or liabilities by the lessee or third parties.

(ii) In cases involving real estate outgrants the consideration for a lease shall be determined by appraisal of fair market rental value according to 10 U.S.C. 2667.

(2) *Sale of property.* When there is legal authority to sell property to the public, the selling price of the property and related accessorial and administrative costs shall be computed according to Volume 11A, Chapter 1 of DoD 7000.14–R.

§ 204.6 Collections.

(a) Collections of charges and fees will be made in advance or simultaneously with the rendering of service unless appropriations and authority allow otherwise. The policies in this part, Volume 5 of DoD 7000.14–R, and DoD Directive 5010.38, shall be used in accounting, controlling, and managing cash and debt collections.

(b) Unless a statute provides otherwise, user charge collections will be credited to the general fund of the Treasury as miscellaneous receipts, as required by 31 U.S.C. 3302.

§ 204.7 Legislative proposals.

(a) Legislative proposals that allow the DoD Component to retain collections may be appropriate when a fee is levied in order to finance a service that is intended to be provided on a substantially self-sustaining basis and thus is dependent upon adequate collections.

(1) The authority to use fees credited to an appropriation is generally subject to limits set in annual appropriations language. However, it may be appropriate to request exemption from annual appropriations control, if a provision of the service is dependent on demand that is irregular or unpredictable (e.g., a fee to reimburse an agency for the cost of overtime pay of inspectors for services performed after regular duty hours).

(2) Legislative proposals that permit fees to be credited to accounts shall be consistent with the full-cost recovery guidelines contained in this part. Any fees in excess of full cost recovery and any increase in fees to recover the portion of retirement costs which recoups all (funded or unfunded) accrual costs not covered by employee contributions are to be credited to the general fund of the Treasury as miscellaneous receipts.

(b) Where the retention of the collections is appropriate, the DoD Components(s) concerned may submit appropriate legislative proposals under applicable legislative procedures included in OMB Circular A–19. These procedures may be obtained from the Office of Legislative Counsel, General Counsel, 1600 Defense Pentagon, Washington, DC 20301–1600. Proposals to remove user fee restrictions or retain collections shall:

(1) Define in general terms the services for which charges will be assessed and the pricing mechanism that will be used.

(2) Specify whether fees will be collected in advance of, or simultaneously with, the provision of service unless appropriations and authority are provided in advance to allow reimbursable services.

(3) Specify where collections will be credited. Legislative proposals should not normally specify precise charges. The user charge schedule should be set by regulation to allow for the administrative updating of fees to reflect changing costs and market values.

§ 204.8 Benefits for which no charge shall be made.

(a) Documents and information requested by members of the Armed Forces when the documents or information requested is required by such personnel in their capacity as Service members.

(b) Documents and information requested by members of the Armed Forces who are in a casualty status, or requested by their next of kin or legal representative.

(c) The provisions of the address of record of a member or former member of the Armed Forces when the address is readily available through a directory (locator) service, and when the address is requested by a member of the Armed Forces or by a relative or a legal representative of a member of the Armed Forces, or when the address of record is requested by any source for the purpose of paying monies or forwarding property to a member or former member of the Armed Forces.

(d) Services requested by, or on behalf of, a member or former member of the Armed Forces and civilian personnel of the Department of Defense (where applicable) or, if deceased, his or her next of kin or legal representative that pertain to the provision of:

(1) Information required to obtain financial benefits regardless of the terms of separation from the Service.

[9] See footnote 1 to § 204.3(c)(1)(ii).

(2) Document showing membership and military record in the Armed Forces if discharge or release was under honorable conditions, except as shown in paragraphs (d)(1) and (d)(4) of this section.

(3) Information relating to a decoration or award or required for memoralization purposes.

(4) Information relating to the review or change in type of discharge or correction of records.

(5) Personal documents, such as birth certificates, when such documents are required to be furnished by the member.

(6) Services that are furnished free according to statutes or Executive Orders.

(7) Information from or copies of medical and dental records or x-ray films of patients or former patients of military medical or dental facilities, when such information is required for further medical or dental care, and requests for such data are submitted by an accredited medical facility, physician, or dentist, or requested by the patient, his or her next of kin, or legal representative. Other requests subject to the Privacy Act shall be according to DoD 5400.11–R, ''DoD Privacy Act Program'' (*see* § 204.3(c)(1)(xi) of this part).

(8) Services requested by, and furnished to, a member of Congress for official use.

(9) Services requested by state, territorial, county, or municipal government, or an agency thereof, that is performing a function related to or furthering a DoD objective.

(10) Services requested by a court, when such services will serve as a substitute for personal court appearance of a military or civilian employee of the Department of Defense.

(11) Services requested by a nonprofit organization that is performing a function related to or furthering an objective of the Federal Government or that is in the interest of public health and welfare, including education.

(12) Services requested by donors in connection with the conveyance or transfer of a gift to the Department of Defense.

(13) Occasional and incidental services (including requests from residents of foreign countries), that are not requested often, when it is determined administratively that a fee would be inappropriate for the occasional and incidental services rendered.

(14) Administrative services offered by reference or reading rooms to inspect public records, excluding copies of records or documents furnished.

(15) Services rendered in response to requests for classification review of DoD classified records, submitted under Executive Order 12065, ''National Security Information,'' and implemented by DoD 5200.1–R. Such services consist of the work performed in conducting the classification review or in granting and completing an appeal from a denial of declassification following such review.

(16) Services of a humanitarian nature performed in such emergency situations as life-saving transportation for non-Armed Forces patients, search and rescue operations, and airlift of personnel and supplies to a disaster site. This does not mean that inter- and intra-governmental agreements to recover all or part of costs shall not be negotiated. Rather, it means the recipients or beneficiary will not be assessed a ''user charge.''

Dated: January 20, 2006.

L.M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 06–730 Filed 1–25–06; 8:45 am]

BILLING CODE 5001–06–M

OFFICE OF MANAGEMENT AND BUDGET

Office of Federal Procurement Policy

48 CFR Part 9904

Cost Accounting Standards Board; Accounting for Insurance Costs

AGENCY: Cost Accounting Standards Board, Office of Federal Procurement Policy, OMB.

ACTION: Staff discussion paper.

SUMMARY: The Cost Accounting Standards (CAS) Board, Office of Federal Procurement Policy, invites public comments on the staff discussion paper (SDP) regarding CAS 416, ''Accounting for Insurance Costs.'' In particular, this staff discussion paper addresses the use of the term ''catastrophic losses'' in CAS 416–50(b)(1).

DATES: Comments must be in writing and must be received by March 27, 2006.

ADDRESSES: Due to delays in OMB's receipt and processing of mail, respondents are strongly encouraged to submit comments electronically to ensure timely receipt. Electronic comments may be submitted to *casb2@omb.eop.gov.* Please put the full body of your comments in the text of the electronic message and also as an attachment readable in either MS Word or Corel WordPerfect. Please include your name, title, organization, postal address, telephone number, and e-mail address in the text of the message. Comments may also be submitted via facsimile to (202) 395–5105.

FOR FURTHER INFORMATION CONTACT: Rein Abel, Cost Accounting Standards Board (telephone: 202–395–3254).

SUPPLEMENTARY INFORMATION:

A. Regulatory Process

The Board's rules, regulations and Standards are codified at 48 CFR Chapter 99. The Office of Federal Procurement Policy Act, 41 U.S.C. 422(g)(1), requires the Board, prior to the establishment of any new or revised CAS, to complete a prescribed rulemaking process. The process generally consists of the following four steps:

1. Consult with interested persons concerning the advantages, disadvantages and improvements anticipated in the pricing and administration of government contracts as a result of the adoption of a proposed Standard (*e.g.*, prepare and publish a SDP).

2. Promulgate an Advance Notice of Proposed Rulemaking (ANPRM).

3. Promulgate a Notice of Proposed Rulemaking (NPRM).

4. Promulgate a Final Rule.

This SDP is issued by the Board in accordance with the requirements of 41 U.S.C. 422(g)(1)(B), and is step one of the four-step process.

B. Background and Summary

The Office of Federal Procurement Policy, Cost Accounting Standards Board, is releasing a SDP on the use of the term ''catastrophic losses'' in CAS 416–50(b)(1). Section 26(g)(1) of the Office of Procurement Policy Act, 41 U.S.C. 422(g)(1), requires that the Board, prior to the promulgation of any new or revised CAS, consult with interested persons concerning the advantages, disadvantages, and improvements anticipated in the pricing and administration of Government contracts as a result of the adoption or revision of an existing Standard. The purpose of the SDP is to solicit public views with respect to the Board's consideration of whether the word ''catastrophic'' should be replaced with a term such as ''significant'' or ''very large'' in 48 CFR 9904.416–50(b)(1) in order to (a) more closely align the Standard with what was intended by its original promulgators and (b) eliminate any confusion between 48 CFR 9904.416 and FAR 31.205–19, Insurance cost.

Respondents are encouraged to identify and comment on any issues not addressed in this SDP that they believe are important to the subject. This SDP reflects research accomplished to date by the staff of the CAS Board in the respective subject area and is issued by the Board in accordance with the requirements of 41 U.S.C. 422(g)(1)(A).

C. Public Comments

Interested persons are invited to participate by submitting data, views or arguments with respect to this SDP, including but not limited to the questions listed in the SDP. All comments must be in writing or by e-mail, and submitted to the mailing or e-mail addresses indicated in the **ADDRESSES** section.

Joshua B. Bolten,

Director.

Cost Accounting Standards Board Staff Discussion Paper (SDP) CAS 416—Catastrophic Losses

Background

Purpose

• The purpose of this SDP is to explore whether the word ''catastrophic'' in CAS 416–50(b)(1) should be replaced with a term such as ''significant'' or ''very large'' to (a) more closely align the Standard with what was intended by its original promulgators and (b) eliminate any potential confusion between CAS 416 and FAR 31.205–19.

CAS 416

• In February, 1976, the CAS Board staff distributed to the public an issues paper on accounting for insurance costs. The staff received 59 responses to the issues paper. An analysis of those responses and a draft Standard were presented to the Board at its meeting of December 20, 1976.

• On January 13, 1977, the draft Standard was distributed to the public. The staff received 64 responses to the draft Standard.

• An analysis of the major issues raised by the public was addressed in Staff Technical Paper Number 38, dated August 23, 1977. The staff technical paper included the following discussion related to the allocation of catastrophic losses:

> The staff draft standard required that a loss be allocated only to the segment in which it occurred. Twelve respondents objected to this provision. They pointed out that the home office can legitimately act as a re-insurance of a small segment against catastrophic losses; otherwise, small segments might find it necessary to purchase outside insurance to protect them. The Staff concurs in this objection; the proposed Standard now provides that a portion of catastrophic losses may be allocated to the home office.

• On September 20, 1978, the CAS Board published CAS 416, which included language on catastrophic losses at CAS 416.50((b)(1). This language, which has remained unchanged since that publication, reads as follows:

> (b) Allocation of insurance costs. (1) Where actual losses are recognized as an estimate of the projected average loss in accordance with 9904.416–50(a)(2), or where actual loss experience is determined for the purpose of developing self-insurance charges by segment, a loss which is incurred by a given segment shall be identified with that segment. However, if the contractor's home office is, in effect, a reinsurer of its segments against catastrophic losses, a portion of such catastrophic losses shall be allocated to, or identified with, the home office.

• In the September 20, 1978 publication of CAS 416, paragraph (6) of Preamble A included the following discussion of the use of the term ''catastrophic losses'' in the Standard:

> Two respondents asked that the standard define or prescribe criteria for determining when a loss is considered to be ''catastrophic'' for purposes of home-office reinsurance agreements; they were concerned about after-the-fact disagreement as to whether a particular loss was ''catastrophic'' and thereby to be allocated in part to the home office, or ''noncatastrophic'' and to be absorbed entirely by the segment. The Board believes that what constitutes ''catastrophic loss'' depends on the individual circumstances of each contractor. The determination should be made at the time the internal loss-sharing policy is established and should be revised, as necessary, for changes in future circumstances. Obviously, a catastrophic loss would be one which would be very large in relation to the average loss per occurrence for that exposure, and losses of that magnitude would be expected to occur infrequently.

FAR 31–205–19

• The language currently at FAR 31.205–19(c)(4), which was originally promulgated under DAR Case 78–400–07, reads as follows:

> Self-insurance charges for risks of catastrophic losses are unallowable.

• The March 19, 1979 report on DAR Case 78–400–7 stated that the purpose of the language was to assure that the Government did not allow self-insurance charges for catastrophic losses, such as earthquakes, which have a very small likelihood of occurring for any particular contractor.

• In early 2001, the Director of Defense Procurement requested the views of interested parties on potential areas for revising FAR Part 31 in light of the evolution of Generally Accepted Accounting Principles, the advent of Acquisition Reform, and experience gained from implementation of FAR Part 31. A series of public meetings was held during spring 2001 to discuss potential opportunities for revising the provisions in FAR Part 31 relating to cost measurement, assignment, and allocation. Attendees included representatives from industry, Government, and other interested parties.

The public meetings resulted in a number of recommendations for revising FAR Part 31, including a recommendation to address the issue of catastrophic insurance at FAR 31.205–19, Insurance Costs. One commenter at the public meeting noted that a literal reading of FAR and CAS would result in the following:

○ In accordance with CAS 416.50(b)(1), a contractor can reinsure the losses of a segment at the home office only if these are catastrophic losses.

○ FAR 31.205–19 disallows self-insurance charges for catastrophic losses.

○ Therefore, any reinsurance of catastrophic losses by the home office under CAS 416 would be unallowable under FAR 31.205–19.

• On January 30, 2003, in an attempt to address the situation raised by the public commenter, the FAR Council published a proposed rule in the **Federal Register** (68 FR 4880). The proposed rule was intended to distinguish the FAR concept of catastrophic losses from the reinsurance concepts in CAS 416 by amending FAR 31.205–19 to define the term ''catastrophic losses'' as ''large dollar coverage with a very low frequency of loss.''

Several public commenters objected to the FAR Council's proposed amendment, asserting that the definition in the proposed rule could be interpreted to include deductibles or over ceiling amounts for property and other high dollar insurance policies. The public commenters further contended that the proposed definition of catastrophic losses would cause contention and uncertainty in the field because it did not account for differences in what constitutes a large loss among different sized contractors. The commenters also asserted that including ''very low frequency of loss'' in the definition would cause confusion. The commenters recommended deleting the proposed definition and continuing the use of existing practices that rely upon individual circumstances and general reasonableness.

• After analyzing the public comments, the FAR Council withdrew the proposed definition. In recommending withdrawal of the rule, the June 26, 2003 report of the FAR Part 31 Streamlining Committee noted the following:

Upon further review, the Committee recommends that the proposed definition of catastrophic losses be deleted from the final rule. The Committee continues to believe that the proposed definition is consistent with the intent of the promulgators of the current language, as evidenced by the March 19, 1979 Committee report underlying DAR Case 78–400–7.

The intent of the proposed coverage was to distinguish catastrophic losses as used in the cost principle from the type of catastrophic loss anticipated by the illustration at CAS 416.60(h). In that illustration, motor vehicle liability losses in excess of a specified amount were absorbed by the home office and reallocated to all segments. In the particular case described, the specified amount was too low based on loss experience to be considered catastrophic under the provisions of CAS 416. However, the illustration appears to anticipate losses that may be catastrophic to a particular segment of a company but not necessarily catastrophic in a more general sense. The Committee does not believe the drafters of the cost principle intended to disallow self-insurance charges for the type of loss anticipated by the CAS illustration. However, since CAS does not include a definition of catastrophic loss, defining the term in FAR could cause confusion by the users of these regulations.

As to the commenter's recommendation that self-insurance charges for catastrophic losses should be allowable, the Committee disagrees. As was noted in the report on DAR Case 78–400–7, the Government should not allow self-insurance charges for catastrophic losses, such as earthquakes, which have a very small likelihood of occurring for any particular contractor.

Key Questions for Consideration

The CAS Board is soliciting comments on this issue from interested parties. In particular, the Board is interested in comments related to the following questions:

1. Do contractors and contracting agencies currently interpret the term ''catastrophic losses'' differently when applying CAS 416.50(b)(1) and FAR 31.205–19(e)? If so, how does the use of the term differ between the two applications?

2. Under CAS 416.50(b)(1), the contractor is required to assign insurance costs on the basis of the projected average loss. Actual losses cannot be used unless they approximate the projected average loss. FAR 31.205–19(c)(4) disallows self-insurance costs for catastrophic losses. Thus, if the term ''catastrophic losses'' is interpreted as having the same meaning in both CAS and FAR, how does a contractor recover amounts related to catastrophic losses, since the costs cannot be assigned based on actual costs under CAS (and therefore are not allowable as actual costs), and the costs are unallowable as self-insurance charges under FAR?

3. How does the insurance industry use the term ''catastrophic losses?''

4. How does the insurance industry's use of the term ''catastrophic losses'' differ from its use in CAS and FAR, if any?

5. Have there been problems in the implementation of CAS 416.50(b)(1) as a result of the use of the term ''catastrophic?''

6. Provide any examples of instances where the use of the term ''catastrophic'' has resulted in contract disputes. For each example provided, include the nature of the dispute and the resolution.

7. Provide any comments as to whether the language at CAS 416.50(b)(1) should be revised. If the recommendation is to revise the language, please provide suggested revisions.

8. Provide any comments regarding use of the term ''extraordinary item'' as used in Generally Accepted Accounting Principles in lieu of the term ''catastrophic insurance.''

[FR Doc. E6–975 Filed 1–25–06; 8:45 am]
BILLING CODE 3110–01–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; 90-Day Finding on a Petition To List the Mussentuchit Gilia as Threatened or Endangered

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of 90-day petition finding.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce a 90-day finding on a petition to list the Mussentuchit gilia (*Gilia [=Aliciella] tenuis*) as threatened or endangered under the Endangered Species Act of 1973, as amended. We find the petition does not provide substantial information indicating that listing *Gilia [=Aliciella] tenuis* may be warranted. Therefore, we will not be initiating a further status review in response to this petition. The public may submit to us any new information that becomes available concerning the status of the species or threats to it.

DATES: The finding announced in this document was made on January 19, 2006. You may submit new information concerning this species for our consideration at any time.

ADDRESSES: The complete file for this finding is available for public inspection, by appointment, during normal business hours at the Utah Fish and Wildlife Office, U.S. Fish and Wildlife Service, 2369 West Orton Circle, Suite 50, West Valley City, Utah 84119. Submit new information, materials, comments, or questions concerning this species to us at the above address.

FOR FURTHER INFORMATION CONTACT: Henry Maddux, Field Supervisor, Utah Fish and Wildlife Office (see **ADDRESSES**) (telephone 801–975–3330, extension 124; facsimile 801–975–3331).

SUPPLEMENTARY INFORMATION:

Background

Section 4(b)(3)(A) of the Endangered Species Act (Act) of 1973, as amended (16 U.S.C. 1531 *et seq.*), requires that we make a finding on whether a petition to list, delist, or reclassify a species presents substantial scientific or commercial information to indicate that the petitioned action may be warranted. We are to base this finding on information provided in the petition and other information that is readily available to us (*e.g.*, in our files). To the maximum extent practicable, we are to make this finding within 90 days of our receipt of the petition, and publish our notice of this finding promptly in the **Federal Register**.

Our standard for substantial scientific information within the Code of Federal Regulations (CFR) with regard to a 90-day petition finding is ''that amount of information that would lead a reasonable person to believe that the measure proposed in the petition may be warranted'' (50 CFR 424.14(b)). If we find that substantial scientific information was presented, we are required to commence a review of the status of the species.

In making this finding, we relied on information provided by the petitioners, and readily available in our files, and evaluated that information in accordance with 50 CFR 424.14(b). Our process of coming to a 90-day finding under section 4(b)(3)(A) of the Act and section 424.14(b) of our regulations is limited to a determination of whether the information in the petition meets the ''substantial scientific information'' threshold.

We added *Aliciella tenuis* to our list of candidate species on September 30, 1993, as a category 2 candidate species

(58 FR 51144). In the February 28, 1996, Notice of Review (61 FR 7595), we discontinued the use of multiple candidate categories and considered the former category 1 candidates as simply ''candidates'' for listing purposes. The *A. tenuis* was removed from the candidate list at that time. This species currently has no Federal regulatory status.

On March 10, 2004, we received a formal petition, dated March 9, 2004, from the Southern Utah Wilderness Alliance, Center for Native Ecosystems, and Utah Native Plant Society, requesting that the Mussentuchit gilia (*Gilia [=Aliciella] tenuis*) found in Utah be listed as threatened or endangered pursuant to section 4 of the Act. This petition was identical to a petition submitted on May 19, 2003, to which, due to funding limitations, we were unable to respond during Fiscal Year (FY) 2003. In addition, all FY 2004 listing funds were allocated to activities in response to court-approved settlements.

When we first receive a petition, we evaluate it in order to determine if an emergency exists such that an emergency listing may be warranted. In a response letter to the petitioners, dated March 16, 2004, we stated that ''the petitioned plant lives primarily on Federal lands, including Capitol Reef National Park, and we know of no clear imminent threat to the species. Therefore, we see no evidence that would lead us to conclude that emergency reclassification of this species is appropriate.''

On May 19, 2005, the petitioners filed a complaint in Utah Federal District Court alleging our failure to complete 90-day or 12-month findings on their petition. On August 26, 2005, the court approved a stipulated settlement agreement and dismissed the case, based on our agreement to submit to the **Federal Register** by January 19, 2006, a completed 90-day finding.

Species Information

Aliciella tenuis is an herbaceous perennial vascular plant in the family Polemoniaceae. The plant grows from a multi-branched woody base, 2–14 inches (in) (5–35 centimeters (cm)) in height. Stems have fine hairs with sticky glands, to which sand usually adheres. The inflorescence is paniculately cymose (a loose arrangement of flowers where the central or terminal flowers generally flower first). Flowers are usually solitary, growing from branched ends. Blooming begins in May and often continues through July (Porter 1998).

The species was first collected as a botanical specimen in 1932 but remained obscure until the 1980s. The species was described in the scientific literature in 1989 (Smith and Neese 1989) as *Gilia tenuis* and subsequently included in the resurrected genus *Aliciella* in 1998 (Porter 1998). We accept the name Aliciella tenuis as the valid name for Mussentuchit gilia.

Aliciella tenuis is a rare, edaphically restricted plant in southwestern Emery, southeastern Sevier, and northern Wayne Counties, Utah. The species' range spans about 45 miles (mi) (72 kilometers (km)) from its South Desert population in Waterpocket Fold within Capitol Reef National Park to its Secret Mesa population in the San Rafael Swell. The species has been delineated into 7 populations, with 1 to 8 separate sites in each population, for a total of 39 sites (Clark 2005). Based on Dr. Johnson (2005, memo to Clark), DNA studies between these populations indicate four genetic groups. The species' known population is estimated at 15,400 individuals (9,774 counted) on approximately 353 acres (ac) (143 hectares (ha)) (Clark 2005).

The largest concentrations of *Aliciella tenuis* are restricted to sandstone (including mudstone and siltstone) ledges and cracks with interbedded gypsum deposits, and on talus slopes derived from those sandstone formations. The species is found on several named geologic formations including the Curtis, Carmel, Dakota, Entrada, Navajo (contact with Carmel), and Summerville (contact with Curtis) formations. Most population sites are difficult to access due to steep treacherous terrain.

Threats Analysis

Pursuant to section (4) of the Act, a species may be determined to be an endangered and threatened species on the basis of any of the following five factors: (A) Present or threatened destruction, modification, or curtailment of habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence. In making this finding, we evaluated whether the petition presented substantial scientific or commercial information to determine that listing *Aliciella tenuis* as threatened or endangered may be warranted. The Act identifies the five factors to be considered, either singly or in combination, to determine whether a species may be threatened or endangered. Our evaluation of these threats, based on information provided in the petition and readily available in our files, is presented below.

A. Present or Threatened Destruction, Modification, or Curtailment of the Species' Habitat or Range

The petition claims that there are 17 populations of *Aliciella tenuis*, and that the species is threatened mainly by activities surrounding oil, gas, and mineral extraction; livestock trampling; off-road vehicle (ORV) use; recreational activities; and weed invasions.

Oil, Gas, and Mineral Extraction

The petition cites general information on oil, gas, and mineral extraction. The petition asserts that 3 of 17 populations are in areas under lease for oil and gas development. Petitioners claim that oil, gas, and mineral exploration involve construction of well pads, roads, pipelines, and other associated facilities, which permanently reduce and fragment habitat. They assert that: (1) Infrastructure activities may lead to removing rock outcrops; (2) mineral development increases recreation activities, such as ORV use; (3) ground disturbance also may introduce noxious weeds and destroy biological soil crusts; and (4) seismic exploration also has long-lasting effects that provide similar ground-disturbing impacts. Additionally, the petitioners state that an increasing number of leases and permits for oil and gas will threaten known and unknown populations.

The petition contends that mining and associated facilities threaten *Aliciella tenuis* habitats. The petition states that the potential range of the plant corresponds to areas that have a high potential for gypsum occurrences. Additionally, it is stated that an active bentonite and zeolite mine owned by Western Clay Company is immediately adjacent to areas known to contain the species.

Evaluation of Information in the Petition

The petition asserts that there are 17 populations of *Aliciella tenuis*. More recent information readily available in our files indicates that there are 7 *Aliciella tenuis* populations with 39 sites; these are the figures we use throughout this finding.

The petition provides some information regarding oil and gas production in the San Rafael Swell generally, but it does not present substantial information that this development has resulted in losses or threatens to result in actual losses of *Aliciella tenuis*. The species is not distributed uniformly across its range. The petition asserts that 3 of 17

populations are in areas under lease for oil and gas development. Currently, known sites of *A. tenuis* are not located in areas targeted for oil, gas, and seismic exploration (Debra Clark, Interagency Botanist, pers. comm. 2003; Fish and Wildlife Service 2006). The mine owned by Western Clay Company referred to in the petition is near 3 of the 17 *A. tenuis* populations in the petition, but these sites are not in the vicinity of the mine and are not being disturbed by mining activities (D. Clark, pers. comm. 2003). Much of the information in the petition identifies potential impacts rather than actual impacts, and there is no evidence presented in the petition or in our files to indicate that known populations are impacted by oil, gas, and mineral extraction. *A. tenuis* generally occurs on steep slopes, in rock cracks, or on ridges away from trail or road use. Most sites are very difficult to access, and therefore there is a low likelihood of disturbance from these activities.

The petitioners provide general characterizations of oil, gas, and mineral extraction impacts. They do not provide substantial information that documents that these activities occur in the areas where *Aliciella tenuis* is found. Also, the petition does not present substantial information on the magnitude and the extent of degradation and loss of habitat to oil, gas, and mineral extraction such that we can conclude that these activities threaten the continued existence of the *A. tenuis*.

Livestock Grazing/Trampling

The petition identifies livestock grazing as an important factor in habitat destruction and alteration in *Aliciella tenuis* habitat. The petition asserts that livestock grazing affects vegetation communities by altering species composition through direct loss of vegetation, and also by habitat degradation due to associated factors that may affect plant succession, wildlife use, time and length of plant flowering (and its effects on pollinators), native plant species presence, and the presence of invasive exotic plant species (especially annual weeds and grasses). Trampling of plants and soil may cause damage to soil crusts, reduce mycorrhizal fungi, increase erosion, and contribute to nonnative plant introductions. In addition, the petition claims that grazing management is of concern due to overgrazing or untimely grazing.

Evaluation of Information in the Petition

The petition describes various impacts associated with livestock and grazing management that could affect *Aliciella tenuis*, and cites general information where impacts to vegetative communities similar to those in southern Utah have resulted from these practices. The petition alleges that 5 of 17 *A. tenuis* populations are on Bureau of Land Management (BLM) grazing allotments. The petition does not provide evidence of actual damage to *A. tenuis* by grazing. Cattle cannot access the majority of occupied sites (approximately 85 percent) and trampling has not been recorded at known sites (D. Clark, pers. comm. 2003; Clark 2005; Lenhart and Clark 2005).

The petitioners did not provide substantial information that documents that areas impacted by grazing management practices are also those in which *Aliciella tenuis* is found. Also, the petition does not present substantial information on the magnitude and the extent of degradation and loss of habitat to livestock grazing such that we could conclude that grazing practices threaten the continued existence of the *A. tenuis*.

Recreational Activities

The petition contends that recreation, especially ORV use, threatens to destroy *Aliciella tenuis* habitats.

Evaluation of Information in the Petition

The information provided by the petitioners does not provide substantial information demonstrating that recreational activities present a threat to *Aliciella tenuis*. *Aliciella tenuis* plants are mostly located on steep side-slopes, in rock cracks, or on ridges away from trail or road use. Most sites are very difficult to access, and the petition acknowledges that the BLM's Resource Management Plan (RMP) limits ORV use to designated roads and trails. Human disturbance, such as human footprints and all-terrain vehicle tracks, are recorded only at 4 of 39 sites; however, these sites are still occupied by *A. tenuis* (Lenhart and Clark 2005). Furthermore, only six of the known sites are in areas accessible by the general public, due to terrain (Lenhart and Clark 2005). In light of the information above, we conclude that the petition does not provide substantial information to indicate that recreational activities threaten the continued existence of *A. tenuis.*

Invasive Plants

The petition maintains that the spread of weeds by several factors (grazing, ORV use, and mining/drilling operations) across the arid West will result in the degradation of *Aliciella tenuis* habitat, thereby increasing endangerment of the relatively slow-reproducing *A. tenuis.*

Evaluation of Information in the Petition

Information presented in the petition is speculative. The petitioners provide information about weed invasions within western arid ecosystems. The petitioners did not provide substantial information that documents that areas impacted by invasive species are the areas where *Aliciella tenuis* is found. Native plants are the dominant species found at *A. tenuis* sites, and highly associated plant species are not exotic weeds or grasses (Lenhart and Clark 2005). Furthermore, the petitioners do not provide substantial information on the magnitude and the extent of habitat impacts by invasive weeds such that we might conclude that they may threaten the continued existence of *A. tenuis.*

B. Overutilization for Commercial, Recreational, Scientific, or Educational Purposes

The petition claims that other gilia species are ornamental cultivars and sought after by rock-garden enthusiasts. The petition also claims that many of the threats identified under Factor A also represent overutilization for commercial, recreational, scientific or educational purposes. Since Factor B refers to ''overutilization'' of the species, and because we have already addressed these threats under Factor A, we will not reevaluate those claims here.

Evaluation of Information in the Petition

The petitioners provide information indicating that gilias are ornamental and collectable. Petitioners refer to the collection of a different, rare gilia species and conclude that Mussentuchit gilia (*Aliciella tenuis*) will likely be sought after when it is more widely known. However, no documentation of *A. tenuis* collection is provided, nor do we or the Interagency Botanist (D. Clark, pers. comm. 2005) know of any evidence of such collection. Furthermore, the majority of sites are in remote, difficult to access locations, with only 6 of 39 known sites considered readily accessible by the general public (Lenhart and Clark 2005). The petition provides only speculative information regarding threats presented by collection. Therefore, we cannot conclude that there is substantial information that this practice threatens the continued existence of *A. tenuis.*

C. Disease or Predation

The petition does not identify disease or predation as threats to *Aliciella*

tenuis. Additionally, the information in our files provides no instances where disease or predation has been documented to occur to *A. tenuis* plants (Porter and Heil 1994; Clark 2000; Clark 2001; Clark 2002; Grobner et al 2004; Clark 2004; Clark 2005; Lenhart and Clark 2005).

D. Inadequacy of Existing Regulatory Mechanisms

The petition contends that existing land use designations and regulatory mechanisms are insufficient to protect populations of *Aliciella tenuis*, and also alleges that State and Federal agencies have failed to conduct monitoring for the species in most of its range and to protect it from impacts associated with energy exploration and development, livestock grazing, recreation, and exotic weeds (*see* Factor A).

Federal Agencies

The petitioners claim that nearly all known populations of *Aliciella tenuis* occur on BLM lands. They acknowledge that BLM has designated *A. tenuis* as a special status species and that 9 of 17 populations of the species occur within Areas of Critical Environmental Concern (ACEC) and within BLM Wilderness Study Areas (WSA). The petition also acknowledges the existence of certain in-place management restrictions which serve to protect *A. tenuis* sites. However, the petition questions whether these designations and other mechanisms to regulate and control various activities, such as grazing and mining (*see* factor A), are sufficient to prevent harm to the *A. tenuis* in a significant portion of its range. They claim that 3 populations are not covered by a BLM RMP. Additionally, they claim that Federal agencies have failed to conduct comprehensive monitoring of the species.

Evaluation of Information in the Petition

The primary concern expressed by the petitioners is that the existing BLM special status designation and occurrence within BLM WSAs and ACECs is insufficient to provide adequate conservation for *Aliciella tenuis.* However, BLM special status designation does include BLM policy direction. The BLM ''special status plants'' include all of the following: (1) Federally-listed and proposed species; (2) Federal candidate species; (3) State-listed species; and (4) BLM sensitive species. BLM sensitive plants are those species that do not occur on Federal or State lists, but which are designated by the BLM State Director for special management consideration.

BLM Manual 6840 provides policy direction that BLM sensitive plant species are to be managed as if they were candidate species for Federal listing so that they do not become listed, while also fulfilling other Federal law mandates. The BLM has a policy of entering into conservation agreements and other conservation measures to protect both State- and BLM-listed species. Capitol Reef National Park (NP) similarly lists *A. tenuis* as a sensitive species.

Sensitive species designation by both BLM and Capitol Reef NP is important because the majority of the *Aliciella tenuis* population occurs on agency-managed lands. Seven *Aliciella tenuis* populations (39 sites) are known (Clark 2005). One population (7 sites) occurs in Capitol Reef National Park and is fully protected by applicable National Park System laws and regulations (Clark 2005). Twenty-six of 32 sites in the other 6 populations are on BLM-managed lands. Of the remaining 6 sites, 1 is on State lands, while ownership of the other 5 is documented as shared between BLM and the State of Utah (Clark 2005). Concerning the 3 populations that the petitioners claim are not covered by an RMP, only a very small number of *A. tenuis* sites are potentially affected by this, and the mere absence of explicit coverage under an RMP does not leave the populations wholly unprotected.

Despite the fact that few if any threats to the species are documented, both the BLM and NPS have continued to develop and implement conservation efforts for the species to ensure continued long-term protection and population monitoring. The Interagency Rare Plant Team was established in 1999 to direct conservation measures for listed and sensitive plant species endemic to central Utah sandstone habitats, including *Aliciella tenuis.* The team has conducted surveys for listed and sensitive plants on lands managed by Richfield and Price Field Offices of the BLM, Capitol Reef National Park, Fishlake National Forest, and the Teasdale District of Dixie National Forest. From 2000 to 2005, approximately 10,500 ac (4,249 ha) have been surveyed for *A. tenuis* on Capitol Reef National Park, BLM, and State lands (Lenhart and Clark 2005). During this period, approximately 2,650 person-hours were allocated by the Interagency Rare Plant Team for *A. tenuis* surveys (Lenhart and Clark 2005).

In addition, the species is included in conservation planning documents such as the 1996 *Gilia caespitosa* [*A. tenuis*] Conservation Agreement and Strategy and the soon to be completed Central Utah Navajo Sandstone Endemics Conservation Strategy and Agreement (CAS), a multi-year joint project by BLM, NPS, U.S. Forest Service, and the Service (Clark, pers. comm. 2005).

Thus, we conclude that the petition does not present substantial information to indicate that *Aliciella tenuis* may be threatened by the inadequacy of existing Federal regulatory mechanisms across all or a significant portion of its range. Interagency cooperation for this species is high and all Federal agencies across the species' range will be signatory parties to the CAS.

State Agencies

The petition claims that lack of State policies leaves the species inadequately protected.

Evaluation of Information in the Petition

The petition states that 3 of 17 populations are on State lands, and acknowledges that 2 of these overlap populations on BLM lands. The petition also acknowledges that the species is currently monitored by the Utah Natural Heritage Program. The information in our files indicates that there are 7 populations with 39 sites; 1 site is on State lands, while 5 sites are documented as shared between BLM and the State of Utah (Clark 2005). No documentation indicates that habitat reduction is occurring on State or private lands. There is no evidence that existing regulatory mechanisms are inadequate to prevent harm to *Aliciella tenuis* populations on State lands. Therefore, the information presented in the petition regarding threats to *A. tenuis* populations on State lands is speculative and does not present substantial information to indicate that listing these populations may be warranted due to inadequate State regulatory mechanisms.

E. Other Natural or Manmade Factors Affecting the Species' Continued Existence

The petition contends that several other factors negatively impact *Aliciella tenuis* populations. They state that the small size of *A. tenuis* populations (many populations with fewer than 25 individuals) makes them vulnerable to extirpation because of a variety of environmental factors, such as stochastic events, drought, climate change, and potential disruption of plant-pollinator interactions.

Evaluation of Information in the Petition

While the petition provides information on the effects of these

environmental factors on plant species in general, no substantial scientific or commercial information regarding *Aliciella tenuis* was provided. Drought, flood, climate change, and plant-pollinator interactions may have the potential to affect small populations. However, we find no indication of long-term species decline for *A. tenuis* due to these or any other factors. Most *A. tenuis* sites have greater than 100 individuals and, as more recent studies indicate, most populations have several hundred to several thousand documented individuals (Clark 2005). Such populations possess greater resiliency to the threats identified in the petition.

A few sites are in active floodplains where plants are periodically washed away (Clark 2005); however, seed source for recolonization of these sites is provided by larger sites found at higher elevations in the landscape (D. Clark, pers. comm. 2005).

The information presented in the petition regarding climate change and its potential impact on *Aliciella tenuis* is speculative.

Finding

We have reviewed the information as it is cited in the petition, along with other pertinent literature and information readily available in our files. After this review and evaluation, we find the petition does not present substantial scientific information to indicate that listing *Aliciella tenuis* may be warranted at this time. Most of the threats described in the petition are speculative in nature, and petitioners admit that only a few populations are susceptible to the threats raised.

We will not be commencing a status review in response to this petition. We encourage interested parties to continue to gather data that will assist with the conservation of the species. If you wish to provide information regarding *Aliciella tenuis*, you may submit your information or materials to the Field Supervisor, Utah Fish and Wildlife Office (*see* **ADDRESSES**).

References Cited

A complete list of all references cited herein is available, upon request, from the Utah Fish and Wildlife Office (*see* **ADDRESSES**).

Author

The primary author of this notice is Heather Barnes, U.S. Fish and Wildlife Service, Utah Fish and Wildlife Office (*see* **ADDRESSES**).

Authority

The authority for this action is section 4 of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq*.).

Dated: January 19, 2006.

Thomas O. Melius,

Acting Director, Fish and Wildlife Service.

[FR Doc. E6–947 Filed 1–25–06; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; 90-day Finding on a Petition To List the American Dipper in the Black Hills of South Dakota as Threatened or Endangered

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of 90-day petition finding.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce a 90-day finding on a petition to list the distinct vertebrate population segment (DPS) of American dipper (*Cinclus mexicanus unicolor*) in the Black Hills of South Dakota as threatened or endangered under the Endangered Species Act of 1973, as amended (Act). We find that the petition and other readily available information do not provide substantial scientific or commercial information indicating that listing the American Dipper in the Black Hills of South Dakota may be warranted. This finding is based on our determination that the American Dipper in the Black Hills of South Dakota does not constitute a valid DPS and, therefore, cannot be considered a listable entity pursuant to section 3(15) of the Act. Therefore, we will not initiate a status review to determine if listing this species is warranted in response to this petition. However, the public may submit to us new information concerning the species, its status or threats to it at any time.

DATES: The finding announced in this document was made on January 19, 2006.

ADDRESSES: Information, data, comments, or questions concerning this petition and our finding should be submitted to the Field Supervisor, South Dakota Ecological Services Office, U.S. Fish and Wildlife Service, 420 South Garfield Avenue, Suite 400, Pierre, South Dakota 57501. The petition, supporting data, and comments will be available for public inspection, by appointment, during normal business hours, at the above address.

FOR FURTHER INFORMATION CONTACT: Pete Gober, Field Supervisor, South Dakota Ecological Services Office at the above address (telephone 605–224–8693; facsimile 605–224–9974).

SUPPLEMENTARY INFORMATION:

Background

Section 4(b)(3)(A) of the Act (16 U.S.C. 1531 *et seq*.), requires that we make a finding on whether a petition to list, delist, or reclassify a species presents substantial scientific or commercial information indicating that the petitioned action may be warranted. We are to base this finding on information provided in the petition and other information that is readily available to us (*e.g.*, in our files). To the maximum extent practicable, we are to make this finding within 90 days of our receipt of the petition, and publish our notice of this finding promptly in the **Federal Register**.

Our standard for substantial scientific information within the Code of Federal Regulations (CFR) with regard to a 90-day petition finding is ''that amount of information that would lead a reasonable person to believe that the measure proposed in the petition may be warranted'' (50 CFR 424.14(b)). If we find that substantial scientific information was presented, we are required to commence a review of the status of the species.

In making this finding, we relied on information provided by the petitioners and information in our files, and evaluated that information in accordance with 50 CFR 424.14(b). Our process of coming to a 90-day finding under section 4(b)(3)(A) of the Act and § 424.14(b) of our regulations is limited to a determination of whether the information in the petition meets the ''substantial scientific information'' threshold.

We do not conduct additional research to make a 90-day finding, nor do we subject the petition to rigorous critical review. Rather, as the Act and regulations contemplate, in coming to a 90-day finding, we acknowledge the petitioner's sources and characterizations of the information unless we have specific information to the contrary.

Our 90-day findings consider whether the petition states a reasonable case for listing on its face. Thus, our finding expresses no view as to the ultimate issue of whether the species should be listed. We reach a conclusion on that

issue only after a more thorough review of the species' status.

Petition

On March 28, 2003, we received a petition dated March 15, 2003, requesting that we list the distinct population segment (DPS) of American dipper (*Cinclus mexicanus unicolor*) in the Black Hills of South Dakota as threatened or endangered under the Act, and for the designation of critical habitat for that DPS. In addition, the petition requested emergency listing of the DPS. The petition, submitted by the Biodiversity Conservation Alliance, Center for Native Ecosystems, Native Ecosystems Council, Prairie Hills Audubon Society and Jeremy Nichols, was clearly identified as a petition for a listing rule, and it contained the names, signatures, and addresses of the requesting parties. Included in the petition was supporting information regarding the species' taxonomy and ecology, historical and current distribution, present status, and potential causes of decline.

We acknowledged the receipt of the petition in a letter to Mr. Jeremy Nichols, dated May 20, 2003. In that letter, we advised the petitioners that emergency listing was not justified and that, due to funding constraints, we would not be able to begin processing the petition in a timely manner.

On July 21, 2003, we received a Notice of Intent to sue from the petitioners contending that the Service had violated the ESA by failing to make a timely 90-day finding on the petition to list a DPS of the American dipper.

On August 20, 2004, the petitioners filed a complaint in Federal District Court against the Secretary of the Interior and the Service for failure to make a 90-day finding under section 4 of the ESA. In a stipulated settlement agreement, we agreed to submit a 90-day finding to the **Federal Register** by January 20, 2006 [*Black Hills Dipper, et al.* v. *Norton et al.* (04-cv-1293 (DDC))]. The settlement agreement was signed and adopted by the District Court for the District of Columbia on January 24, 2005. This notice constitutes our 90-day finding for the petition to list a DPS of the American dipper in the Black Hills of South Dakota as endangered or threatened, pursuant to the agreement.

Species Information

The American dipper is a small, gray passerine bird that inhabits western Canada and the western United States, including the Black Hills (Pettingill and Whitney 1965; Anderson 2002). The American dipper utilizes permanent, clean, cold, and swift mountain streams (Kingery 1996; Tyler and Ormerod 1994; Price and Bock 1983; Feck 2002) with abundant and healthy populations of benthic macroinvertebrate, the dipper's prey (Price and Bock 1983; Kingery 1996; Tyler and Ormerod 1994; Ealey 1977). Dippers are usually found in streams with rock, sand, and rubble substrates, which also are associated with the highest abundance of aquatic invertebrates. American dippers establish linear territories along a river in early spring (Kingery 1996). They remain in or near their territories most of the year, depending upon the availability of open water. Dipper nest sites can be found on streamside rock cliffs, waterfalls, on large rocks in midstream, or under bridges (Kingery 1996).

There are few records of American dippers making long distance flights, and these records do not substantiate that these movements contribute to the establishment of new populations. No instances of long distance dispersal of dippers between the Black Hills and the next nearest populations of American dipper to the west in the Big Horn Mountains of north-central Wyoming and the Laramie Range of east-central Wyoming have been documented.

Distribution, Abundance, Trends

The American dipper is at the eastern edge of its range in the Black Hills. The dipper is a permanent year-round resident of the Black Hills and has historically been known to inhabit nearly all permanent, fast-flowing streams in the area (Pettingill and Whitney 1965). The species is not known to disperse or migrate long distances; the extent to which it moves to any degree between the geographically separated areas that it occupies is undocumented (Tyler and Ormerod 1994). The dipper population in the Black Hills is isolated from other populations by geographical barriers to dispersal in the form of extensive grasslands, poor quality stream habitat, and the lack of water connections to dipper populations existing west of the Black Hills (Backlund 2001).

Verified historic American dipper reports have been recorded on six streams and/or their tributaries in the Black Hills: French Creek; Rapid Creek; Box Elder Creek; Elk Creek; Whitewood Creek; and Spearfish Creek (Backlund 2001). Other streams are unable to support self-sustaining populations of dipper due to habitat degradation, erratic water flows, loss of water flow, poor water quality, and other impacts (Backlund 2001). Currently, nesting dippers can be found on only two streams in the Black Hills—Spearfish Creek and Whitewood Creek.

Dipper nest surveys in the Black Hills were started in 1993 and became more extensive from 2003 to 2005. The lowest number of dippers reported on Spearfish Creek was 10 in 1997, with only 2 nests found (Backlund 2001). In 2004, the number of dippers reported on Spearfish Creek was approximately 49, with 31 nest attempts (Lovett 2004). In 2004, Whitewood Creek had 12 adults observed and 7 known nest attempts (Lovett 2004).

Distinct Vertebrate Population Segment

The petitioners have asked us to consider listing a DPS of the American dipper in the Black Hills of South Dakota. Under the Act, we can consider for listing any species, subspecies, or DPS of any species of vertebrate fish or wildlife that interbreeds when mature, if information is substantial to indicate that such action may be warranted. To implement the measures prescribed by the Act and its congressional guidance, we developed a joint policy with the National Oceanic and Atmospheric Administration entitled Policy Regarding the Recognition of Distinct Vertebrate Population Segments under the Act (61 FR 4722; February 7, 1996) (DPS Policy). Under the DPS policy, we must consider three elements in making our decision whether an entity qualifies as a DPS that warrants listing as endangered or threatened under the ESA. The three elements are: (1) The population segment's discreteness in relation to the remainder of the species to which it belongs; (2) the population segment's significance to the species to which it belongs; and (3) the population segment's conservation status in relation to the Act's standards for listing (*i.e.*, when treated as if it were a species, is the population segment endangered or threatened?). Following is our evaluation of these elements in relation to the petitioned entity (the American dipper in the Black Hills of South Dakota).

Discreteness

The DPS policy states that a population segment of a vertebrate species may be considered discrete if it satisfies either one of the following two conditions: It must be markedly separated from other populations of the same taxon as a consequence of physical, physiological, ecological, or behavioral factors, or it must be delimited by international governmental boundaries within which significant differences in control of exploitation, management of habitat conservation status or regulatory mechanisms exist

that are significant in light of section 4(a)(1)(D) of the Act.

Information Provided in the Petition

Substantial information is presented in the petition to indicate that the Black Hills population may be markedly separated from other populations of the American dipper as a consequence of physical factors. The Black Hills is an isolated mountain range located within the plains of western South Dakota and northeastern Wyoming (Raventon 1994). The Great Plains, which entirely surrounds the Black Hills, creates a major physical barrier separating the Black Hills American dipper from other Rocky Mountain populations to the west (Hall *et al.* 2002). The Bighorn Mountains, approximately 150 to 200 miles (mi) (241 to 322 kilometers (km)) to the west, is the closest mountain range to the Black Hills (Froiland 1990). The expanse of grassland separating the Black Hills from other mountain ranges is incapable of supporting American dippers and represents a significant barrier to dispersal (Backlund 2001; Voelker 2002). The streams and rivers of the Great Plains are described as typically silt-laden, turbid, alkaline, and subject to erratic flows which precludes their use by dippers (Smith and Hubert 1989).

Information in the petition, as supported by information readily available in our files, suggests that there is a substantial physical isolation of the Black Hills population of the American dipper. Therefore, the petition presents substantial information indicating that the Black Hills population of the American dipper meets a condition for discreteness under our DPS policy. The Black Hills population of the American dipper is not delimited by international governmental boundaries within which significant differences in control of exploitation, management of habitat conservation status or regulatory mechanisms exist that are significant in light of section 4(a)(1)(D) of the ESA.

Significance

Pursuant to our DPS policy, in addition to our consideration that a population segment is discrete, we further consider its biological and ecological significance to the taxon to which it belongs, within the context that the DPS policy be used ''sparingly'' while encouraging the conservation of genetic diversity (61 FR 4722; February 7, 1996). This consideration may include, but is not limited to: (1) Evidence of the persistence of the discrete population segment in an ecological setting that is unique for the taxon; (2) evidence that loss of the population segment would result in a significant gap in the range of the taxon; (3) evidence that the population segment represents the only surviving natural occurrence of a taxon that may be more abundant elsewhere as an introduced population outside its historical range; and (4) evidence that the discrete population segment differs markedly from other populations of the species in its genetic characteristics.

Information Provided in the Petition

a. Persistence of the population segment in an ecological setting that is unique for the taxon.

The American dipper occupies permanent, clean, cold, and swift mountain streams throughout the western half of North America, including the Black Hills (Kingery 1996). The petition contends that the streams in the Black Hills inhabited by dippers may be a unique ecological setting because the Black Hills themselves are a unique ecosystem. We recognize that the Black Hills have many unique ecological features, but information readily available in our files (*e.g.*, Kingery 1996) indicates that these mountain ecosystems share commonalities such as clean, cold, swift mountain streams with suitable substrate that provide the habitats for invertebrate species used by dippers. In that respect, the Black Hills are similar to other western mountain ecosystems.

In addition, the petitioners claim that Black Hills streams have features that make them ecologically unique. Streams throughout the Rocky Mountains vary in many features, including elevation, gradient, substrate, parent geological material, riparian vegetation, etc., such that virtually every stream could be considered ''unique.'' Information readily available in our files (*e.g.*, Kingery 1996) indicates that the key features of Black Hills streams used by dippers—cold temperatures, good water quality, suitable substrate, and swift flow—are the same key features of dipper-utilized streams elsewhere throughout the Rocky Mountains. Accordingly, we do not believe the petition presents substantial information that the clean, cold swift streams of the Black Hills occupied by dippers are an ecological setting that is unique for this subspecies.

b. Loss of the population segment would result in a significant gap in the range of taxon.

The petition claims that the Black Hills dipper population is at the eastern edge of its global distribution, and its loss would result in a significant gap in the range of the dipper. Information readily available in our files (*e.g.*, Kingery 1996) states that the American dipper's breeding range extends from western Alaska eastward across northcentral Alaska; southward along the Pacific Coast and throughout the Rocky Mountains into New Mexico. They are absent from the Great Basin area except for scattered populations. The range includes mountain streams in an area that is approximately 5,000 km from north to south and approximately 1,800 km from west to east at its widest point. Within that range, there are thousands of suitable streams and tens of thousands of kilometers of occupied streams. The Black Hills dipper population occupies two streams that represent less than 80 km of occupied stream habitat. The dipper-occupied streams in the Black Hills are on the eastern edge of the overall dipper's range and if lost would not create a gap in the overall species range with other dipper populations. The mountain streams of the Black Hills provide the easternmost habitat for the American dipper. We conclude that the petition does not present substantial information that loss of the population segment would result in a significant gap in the range of taxon.

c. The population segment represents the only surviving natural occurrence of a taxon that may be more abundant elsewhere as an introduced population outside its historical range.

The petition does not address this factor. The American dipper survives naturally throughout much of western North America.

d. The discrete population segment differs markedly from other populations of the species in its genetic characteristics.

The petition does not address this factor. We are aware that a genetic analysis is being conducted to determine whether the Black Hills population of the American dipper is genetically distinct from other American dipper populations in North America (C. Anderson, Black Hills State University, pers. comm. 2005). To date, the research has analyzed samples from 6 populations (Black Hills, SD; Bighorns, WY; and four locations in west central Montana and east central Idaho). Preliminary information from this research suggests that genetic differences may exist among the dipper populations studied. However these results are too preliminary to determine the significance of the Black Hills population of American dipper to the taxon as a whole.

Finding

We have reviewed the information presented in the petition, and have

evaluated that information in relation to information readily available in our files. On the basis of our review, we find that the petition does not present substantial scientific or commercial information to indicate that listing the American dipper in the Black Hills of South Dakota may be warranted. This finding is based on the lack of substantial scientific evidence to indicate that the American dipper in the Black Hills of South Dakota constitutes a valid DPS. Although the population is discrete, neither the information in the petition nor the information readily available in our files constitutes substantial scientific information that the Black Hills dipper population is significantly unique in relation to the remainder of the taxon. Therefore, we conclude that the American dipper in the Black Hills of South Dakota is not a listable entity pursuant to section 3(15) of the ESA. We will not be commencing a status review in response to this petition. However, we will continue to monitor the taxon's population and status and trends, potential threats, and ongoing management actions that might be important with regard to the conservation of the American dipper across its range. We encourage interested parties to continue to gather data that will assist with these conservation efforts. New information should be submitted to the Field Supervisor, South Dakota Ecological Services Office (see **ADDRESSES**).

The petitioners also request that critical habitat be designated for this species. The petition does not present substantial information that the American dipper is a DPS so we need not address the designation of critical habitat at this time.

References Cited

A complete list of all references is available upon request from the Field Supervisor (see **ADDRESSES**).

Author

The primary authors of this document are staff at the South Dakota Ecological Services Office (see **ADDRESSES**).

Authority

The authority for this action is the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Dated: January 19, 2006.

Thomas O. Melius,

Acting Director, Fish and Wildlife Service.

[FR Doc. E6–943 Filed 1–25–06; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF COMMERCE

National Marine Fisheries Service

50 CFR Parts 223 and 224

[Docket No. 060113009–6009–01; I.D. 010506D]

Endangered and Threatened Species; Notice of 90–day Finding on a Petition to List the North Pacific Right Whale as an Endangered Species Under the Endangered Species Act

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration, Commerce.

ACTION: Notice of petition finding; request for information; and initiation of status review.

SUMMARY: NMFS announces a 90–day finding regarding a petition to list the North Pacific right whale, *Eubalaena japonica*, as an endangered species under the Endangered Species Act of 1973, as amended (ESA). After review, NMFS finds that the petition presents substantial scientific information indicating that this action may be warranted. NMFS is initiating a review of the status of the North Pacific right whale, and is soliciting data, information, and comment on the subject action.

DATES: To be considered in the 12–month finding, information and comments should be submitted to NMFS by April 26, 2006.

ADDRESSES: Data, information, or comments concerning this petition should be submitted to Kaja Brix, Assistant Regional Administrator, Protected Resources Division, Alaska Region, NMFS, Attn: Lori Durall. Comments may be submitted by:

- E-mail: *0648–XB41–NPRW@noaa.gov*. Include in the subject line the following document identifier: North Pacific Right Whale Listing. E-mail comments, with or without attachments, are limited to 5 megabytes.
- Mail: P.O. Box 21668, Juneau, AK 99802.
- Hand delivery to the Federal Building: 709 W. 9th Street, Juneau, Alaska.
- Fax: (907) 586–7012.
- Federal e-rulemaking portal: *http://www.regulations.gov*.

FOR FURTHER INFORMATION CONTACT: Mr. Brad Smith, NMFS, 222 West 7th Avenue, Anchorage, AK 99517, telephone (907) 271–5006, fax (907) 271–3030, Ms. Kaja Brix, NMFS, (907) 586–7235, fax (907) 586–7012; or Dr. Kate McFadden, NMFS, (301) 713–1401, fax (301) 427–2523.

SUPPLEMENTARY INFORMATION:

Background

Section 4(b)(3)(A) of the ESA, as amended (16 U.S.C. 1531 *et seq.*) requires that NMFS make a determination as to whether a petition to list a species presents substantial scientific or commercial information indicating that the petitioned action may be warranted. To the maximum extent practicable, this finding is to be made within 90 days of the date the petition was received, and the finding is to be published promptly in the **Federal Register**. If NMFS finds that substantial scientific information is presented, it is required to promptly commence a review of the status of the species involved if one has not already been initiated.

NMFS has made a 90–day finding on a petition to list the North Pacific right whale. The petition, dated August 16, 2005, was submitted by the Center for Biological Diversity, P.O. Box 40090, Berkeley, CA 94704–4090, and was received by NMFS on August 19, 2005. Petitioner requests NMFS to list the North Pacific right whale as a new species, *Eubalaena japonica*, and to designate the species as endangered under the ESA. Its request is based, in part, on recent scientific information which establishes a new taxonomic classification for the right whale. This reclassification would recognize the North Pacific right whale as the new species *E. japonica*.

NMFS has reviewed the petition, the literature cited in the petition, and other literature and information available in NMFS files. On the basis of that information, we find the petition presents substantial scientific information indicating that the requested action may be warranted. NMFS' finding is based in part on recent scientific papers recognizing the North Pacific right whale as genetically distinct from the North Atlantic right whale, as well as recent findings of the International Whaling Commission on the subject. We request any information regarding the taxonomy and status of the North Pacific right whale, its habitat, biology, movements and distribution, threats to the species, or other pertinent information. A copy of the petition may be viewed at the NMFS website: *http://www.fakr.noaa.gov/protectedresources/whales/default.htm*

Authority

The authority for this action is the ESA, as amended (16 U.S.C. 1531 *et seq.*).

Dated: January 20, 2006.

John Oliver,

Deputy Assistant Administrator for Operations, National Marine Fisheries Service.

[FR Doc. E6–1007 Filed 1–25–06; 8:45 am]

BILLING CODE 3510–22–S

Notices

Federal Register
Vol. 71, No. 17
Thursday, January 26, 2006

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Forest Service

Red Rock Ranger District, Coconino National Forest, AZ, Outfitter and Guide Management Plan

AGENCY: Forest Service, USDA.

ACTION: Notice of intent to prepare an environmental impact statement.

SUMMARY: The Coconino National Forest is proposing to develop an Outfitter-Guide Management Plan for the Red Rock Ranger District that will serve the public need for outfitting and guide activities in ways that protect the area's natural and cultural resources as well as the more primitive social settings desired for the National Forest by most visitors. The area being considered is limited to the Red Rock Ranger District and the scope of the analysis is limited to primarily outfitter and guide operations on the ranger district. A few general recreation management proposals are being considered when they are connected with outfitter and guide activities. Some changes to guidelines and objectives in the Coconino National Forest Land and Resource Management Plan direction are also being considered.

DATES: Comments concerning the scope of the analysis must be received within 30 days of the publication of this Notice of Intent in the **Federal Register**. The draft environmental impact statement is expected May 2006 and the final environmental impact statement is expected December 2006.

ADDRESSES: Send written comments to: Outfitter-Guide Team Leader, Red Rock Ranger District, PO Box 20249, Sedona, AZ 86341.

For further information, mail correspondence to: Outfitter-Guide Team Leader, Red Rock Ranger District, PO Box 20249, Sedona, AZ 86341.

More detailed information on this project is also posted on the Coconino National Forest Web site at: *http://www.fs.fed.us/r3/coconino* link is under NEPA/EFOIA

FOR FURTHER INFORMATION CONTACT: William Stafford, Recreation Staff, Red Rock Ranger District, Coconino National Forest, USDA Forest Service, telephone (928) 203–7529, see address above.

SUPPLEMENTARY INFORMATION:

Purpose and Need for Action

The Purpose and Need for this project relates to the unique character of the Red Rock Ranger District's landscape, particularly around the Sedona, Arizona community. It is attracting increasing numbers of people; including many visitors who look to outfitter-guides to assist them have a safe, enjoyable, and learning experience on the National Forest. Additionally an ever increasing number of people living and working nearby in adjacent communities are also using the same National Forest areas. Consequently, the National Forest's natural and cultural resources are getting unprecedented pressure (and impact), sometimes eliminating, or at least diminishing solitude, natural quiet, and the natural appearing landscapes.

The red rock landscape around Sedona is currently the focus of the commercial outfitter-guide services. The Forest Service has issued permits to these outfitter-guides because they offer opportunities that visitors might not otherwise have. Outfitter-guides provide knowledge, skills, and equipment that enhance a visitor's experience or are required for safe participation in an activity. For the Forest Service, outfitter-guides can assist in the protection of the natural and heritage resources (such as ''Leave no trace'', etiquette, and interpretation/education) and management of infrastructure.

During the last 10 years in particular, competition between permit-holders and potential permit-holders has become evident and continues to grow in intensity. The Coconino National Forest Land and Resource Management Plan for the area around Sedona, where interest for permits is most intense, states that opportunities for additional guided services are very limited. Interest in permits for this area currently exceeds what the Forest Service has been willing to authorize. Compounding this issue is the popularity of the area and visitation each year by literally millions of others involved in a similar set of activities but without the services of an outfitter. In previous analysis and studies for the Forest Plan, Forest users in the Sedona area indicated their preference for small group, non-commercial activities on the National Forest.

As activities from commercial and non-commercial activities have increased over the years, local residents and neighborhoods have been affected. They have developed a high level of interest in outfitter-guide activities since many of the desirable tour areas on national forest lands are within the Sedona-area urban interface. Tour and general public use often occurs near private lands and residential subdivisions and sometimes adversely impacts these neighborhood areas. Additionally, impacts due to high use from both groups of users and inadequate maintenance are evident across the landscape. Physical impacts include loss of vegetation due to trampling and soil compaction, unplanned roads and trails, and rutting affecting water quality and soil erosion. Social impacts include reduced quality of experience, noise, and dust. These impacts are contrary to the direction in the current Forest Plan for the areas around Sedona.

Areas of the Red Rock Ranger District outside the immediate vicinity of Sedona have little outfitter-guide use and offer locations and activities that could provide services the public and assist in management and protection of the National Forest.

The focus of this analysis will be to develop an outfitter-guide management plan for the Red Rock Ranger District that will serve the public need for outfitting and guide activities in ways that protect the area's natural and cultural resources as well as the more primitive social settings desired for the National Forest by most visitors.

Proposed Action

- The Red Rock Ranger District has been divided into 39 Recreation use units (RUU's) that reflect vegetation, topography, social settings.
- Opportunities for types of outfitter-guide operations have been identified for each RUU as well as the need for services in each unit. These opportunities would be offered through a competitive process in the future if the proposed action is selected. Most of the

RUU's within 1 mile of the Sedona area will not have new motorized opportunities offered.

• New opportunities near Sedona include: public transit, mountain biking, weddings, coach/bus tours, metaphysical tours and hiking.

• New opportunities in the remainder of the Red Rock Ranger District include: tours of selected heritage sites, mountain bike tours, scenic touring (*i.e.*, jeeps), ATV tours, rock climbing, 4-wheel drive trips, hummer tours, equestrian/trail rides, hiking, hot air balloons, backpacking, livestock packing, hunting, geo-caching, fishing, river rafting, winter sports and metaphysical tours.

• All outfitter-guide operations will be subject to area-wide and site specific mitigation measures to protect natural, historic and infrastructure resources of the National Forest as well as balance use with the general public and experiential objectives.

• Establish local procedures for administration of outfitter-guide permits as defined in national policy, including priority use commensurate with actual use, adjustments of permitted use based on actual use.

• Establish Limits of Acceptable Change (LAC) for outfitter operations, including a monitoring plan.

• Optimize the availability of Broken Arrow for popular outfitter-guide activities and help mitigate impacts to adjacent residents and to the National Forest by:

1. Installation of a night gate with motorized traffic hours of daylight to dark.

2. Requiring private motorized vehicle users to have a ''non-fee'' permit.

3. Setting an annual cap on the historic Pink Jeep Tours permit.

4. Authorizing additional (new) outfitter-guide services at no more than 2 vehicles per day using an annual lottery to select the permit-holder.

• Optimize the availability of Soldier Pass for popular outfitter-guide activities and help mitigate impacts to adjacent residents and to the National Forest by:

1. Requiring private motorized vehicle users to have a ''non-fee'' permit.

2. Reducing the at-one-time 4x4 vehicle limit for outfitter-guides from 10 to 3 vehicles.

3. Increasing the annual cap for outfitter-guide vehicles.

4. Authorizing additional (new) outfitter-guide services at no more than 1 vehicle per day using an annual lottery to select the permit-holder.

• Optimize the availability of Greasy Spoon and the ''pipeline'' for popular outfitter-guide activities:

1. Use an annual lottery to offer and authorize additional outfitter-guide services at no more than 2 vehicles per day.

• Address public's interest and need for outfitter-guides and address competitive interest in providing outfitter-guide services:

1. Issue Prospectus to offer new outfitter-guide opportunities throughout the ranger district.

2. Issue Temporary Permits for the first 5 years to the successful applicants. Make priority use permits with a 5-year Term available after 5 years if the LAC monitoring supports continuation of the outfitter-guide service.

3. Make Permits, with standard/pre-defined Terms and Conditions, available to wedding planners on demand (across the counter) as long as LAC monitoring supports. Adjust Terms and Conditions and availability of Permits commensurate with LAC monitoring.

4. Designate group (60 or less participants) recreation event sites and make permits with preset Terms and Conditions available on-demand (across the counter) on a first-come, first serve basis. (Designated sites are also appropriate for non-commercial group activities, *i.e.* 75 or more people for personal wedding activities or reunions.)

5. Annually accept Proposals for institutional outfitter-guide activities. Make 1-Year Temporary Permits available with preset and other (based on Proposal and LAC monitoring) Terms and Conditions if LAC monitoring supports.

• Mitigate impacts to natural and cultural resources on the National Forest:

1. Include terms and conditions in all outfitter-guide permits that relate to vehicle use of roads, noise mitigation, permit identification, wet weather procedures, Leave No Trace principles, Forest closures and restrictions, First Aid and CPR, land stewardship tasks, regulation violation notification, wildlife mitigation, weed control and riparian protection.

2. Include terms and conditions a part of all outfitter-guide permits for Wilderness areas that all Wilderness activities must be wilderness dependent, limit group size provide Leave No Trace messages and preserve Wilderness values.

• Address the issue of business growth:

1. Manage unallocated opportunities as a ''reserve'' for ''temporary'' use and business growth potential. Accept Proposals for temporary use authorization for business growth regularly under specified conditions.

Responsible Official

District Ranger, Red Rock Ranger District is the responsible official related to decision on issuance of permits and outfitter-guide uses of National Forest. There is potential for some minor decisions that will result in changes to the Coconino National Forest Land and Resource Management Plan. Nora Rasure, Coconino National Forest Supervisor, is the responsible official for any decision related to amendments to the Coconino National Forest Land and Resource Plan.

Nature of Decision To Be Made

This decision is intended to determine the locations, limitations, management and terms of outfitter-guide permits and opportunities on the Red Rock Ranger District for the next 5–10 years. There are some decisions that may result in changes to general public recreation use as they relate to outfitter-guide activities and locations. A few decisions may result in changes to recreation use guidance and objectives in the Coconino National Forest Land and Resource Plan such as recreation opportunity spectrum.

Scoping Process

Public participation will be especially important at several points during the analysis. The Forest Service will be seeking information, comments and assistance from the Federal, State, and local agencies and other individuals or organizations that may be interested in or affected by the proposed action. Public comment will be accepted 30 days following the printing of this Notice in the **Federal Register**. The Red Rock Ranger District is sending out letters with an executive summary of the proposed action to a mailing list of parties who have expressed interest in these activities asking for comments on the proposals. In addition, news releases announcing the proposal and public open house meeting were sent to media resources in northern Arizona. The Open House Public Meeting is scheduled for February 9, 2006, 4 p.m.–7 p.m. at the Elks Lodge, 110 Airport Road in Sedona, Arizona. Information related to the proposed action and interdisciplinary specialists will be present to answer questions about the proposal and the public will be able to provide comments at this meeting. Comments may also be submitted as described above before or after the meeting. The Draft EIS is expected to be published in May 2006 and a Notice of Availability will be published in the **Federal Register** at the time it is available for public review and

comment. The final EIS and decision is expected in December 2006. Public questions and comments regarding this proposal are an integral part of the environmental analysis process. Comments will be used to identify issues and develop alternatives to this proposal. To assist the Forest Service in identifying and considering issues and concerns on the proposed action, comments should be as specific as possible.

Preliminary Issues

A. Long standing outfitter guide operators have not received 5-year term or priority use permits.

B. Levels of authorized outfitter-guide use (too much commercial use for some and not enough opportunities for others) and limits on the number of permits in the popular and highly marketable tourist locations: such as, Broken Arrow, Soldier Pass, Greasy Spoon, Honanki, etc.

C. The Forest Service has not authorized increased opportunities for existing outfitter-guides with temporary permits.

D. Sustaining of historic permits, versus adjusting/limiting authorizations and opening up new competitive opportunities.

E. The Forest Service has not issued new outfitter-guide authorizations in the greater Sedona area.

F. Inconsistencies and deficiencies in outfitter-guide quality of service and performance.

G. Demand for group and large community events on the National Forest is inconsistent with current emphasis in the Forest Plan.

H. Lack of permit system for commercial wedding planning and operations on the National Forest.

I. Authorization and management of recreation events, such as size, location, type of event, limitations.

J. Authorization and management of institutional outfitter-guide activities.

K. Inconsistencies between desire of permit holders for unlimited business growth and current Forest Plan direction for encounter frequencies and limited commercial activities.

L. Perceived monopoly of business income related to certain locations.

M. Concern related to resource and infrastructure impacts and damage from outfitter-guide activities and general recreation use.

N. Implementation of new regulations.

O. Some existing outfitter guides allocations are not used and that non-use has not been available for others or administered under current policy.

P. Concerns about delay in completing reallocation of existing permitted guides.

Q. Displacement of general public use of area as a result of outfitter guide use, (common wedding or large group use locations.)

Comment Requested

This notice of intent initiates the scoping process which guides the development of the environmental impact statement. Comments should be as specific as possible including location of concern area, why the concern is important, and data supporting any information considered not accurate. Comments should also indicate interest in being included on a mailing list for the project with accurate mailing address and contact information.

Early Notice of Importance of Public Participation in Subsequent Environmental Review: A draft environmental impact statement will be prepared for comment. The comment period on the draft environmental impact statement will be 45 days from the date the Environmental Protection Agency publishes the notice of availability in the **Federal Register**.

The Forest Service believes, at this early stage, it is important to give reviewers notice of several court rulings related to public participation in the environmental review process. First, reviewers of draft environmental impact statements must structure their participation in the environmental review of the proposal so that it is meaningful and alerts an agency to the reviewer's position and contentions. *Vermont Yankee Nuclear Power Corp.* v. *NRDC,* 435 U.S. 519, 553 (1978). Also, environmental objections that could be raised at the draft environmental impact statement stage but that are not raised until after completion of the final environmental impact statement may be waived or dismissed by the courts. *City of Angoon* v. *Hodel,* 803 F.2d 1016, 1022 (9th Cir. 1986) and *Wisconsin Heritages, Inc.* v. *Harris,* 490 F. Supp. 1334, 1338 (E.D. Wis. 1980). Because of these court rulings, it is very important that those interested in this proposed action participate by the close of the 45-day comment period so that substantive comments and objections are made available to the Forest Service at a time when it can meaningfully consider them and respond to them in the final environmental impact statement.

To assist the Forest Service in identifying and considering issues and concerns on the proposed action, comments on the draft environmental impact statement should be as specific as possible. It is also helpful if comments refer to specific pages or chapters of the draft statement. Comments may also address the adequacy of the draft environmental impact statement or the merits of the alternatives formulated and discussed in the statement. Reviewers may wish to refer to the Council on Environmental Quality Regulations for implementing the procedural provisions of the National Environmental Policy Act at 40 CFR 1503.3 in addressing these points.

Comments received, including the names and addresses of those who comment, will be considered part of the public record on this proposal and will be available for public inspection.

(Authority: 40 CFR 1501.7 and 1508.22; Forest Service Handbook 1909.15, Section 21)

Dated: January 20, 2006.

Nora B. Rasure,

Forest Supervisor, Coconino Naitonal Forest.

[FR Doc. 06–737 Filed 1–25–06; 8:45 am]

BILLING CODE 3410–11–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–428–602]

Brass Sheet and Strip from Germany: Final Results of the Full Sunset Review of the Antidumping Duty Order

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: On October 28, 2005, the Department of Commerce (''the Department'') published a notice of preliminary results of the full sunset review of the antidumping duty order on brass sheet and strip (''BSS'') from Germany (70 FR 62093) pursuant to section 751(c) of the Tariff Act of 1930, as amended (''the Act''). We provided interested parties an opportunity to comment on our preliminary results. We did not receive comments from either domestic or respondent interested parties. As a result of this review, the Department finds that revocation of this order would be likely to lead to continuation or recurrence of dumping at the levels indicated in the ''Final Results of Review'' section of this notice.

EFFECTIVE DATE: January 26, 2006.

FOR FURTHER INFORMATION CONTACT: Audrey R. Twyman, Brandon Farlander, or David Goldberger, AD/CVD Operations, Office 1, Import Administration, International Trade Administration, U.S. Department of

Commerce, 14th Street & Constitution Avenue, NW, Washington, DC, 20230; telephone: 202–482–3534, 202–482–0182, and 202–482–4136, respectively.

SUPPLEMENTARY INFORMATION:

Background

On October 28, 2005, the Department of Commerce (the ''Department'') published in the **Federal Register** a notice of preliminary results of the full sunset review of the antidumping duty order on BSS from Germany, pursuant to section 751(c) of the Act. *See Brass Sheet and Strip from Germany: Preliminary Results of the Sunset Review of Antidumping Duty Order*, 70 FR 62093 (October 28, 2005) (''*Preliminary Results*''). In our *Preliminary Results*, we determined that revocation of the order would likely result in continuation or recurrence of dumping with a margin of 3.81 percent for Wieland–Werke AG and an ''all others'' rate of 7.30 percent. We did not receive a case brief on behalf of either domestic or respondent interested parties within the deadline specified in 19 CFR 351.309(c)(1)(i).

Scope of the Order

The product covered by this order is brass sheet and strip, other than leaded and tinned. The chemical composition of the covered product is currently defined in the Copper Development Association (''C.D.A.'') 200 Series or the Unified Numbering System (''U.N.S.'') C2000. This order does not cover products with chemical compositions that are defined by anything other than either the C.D.A. or U.N.S. series. In physical dimensions, the product covered by this order has a solid rectangular cross section over 0.0006 inches (0.15 millimeters) through 0.1888 inches (4.8 millimeters) in finished thickness or gauge, regardless of width. Coiled, wound–on-reels (traverse wound), and cut–to-length products are included. The merchandise is currently classified under Harmonized Tariff Schedule of the United States (''HTSUS'') item numbers 7409.21.00 and 7409.29.00. The HTSUS numbers are provided for convenience and customs purposes. The written description of the scope of this order remains dispositive.

Analysis of Comments Received

The Department did not receive case briefs from either domestic or respondent interested parties. Therefore, we have not made any changes to our *Preliminary Results*.

Final Results of Review

We determine that revocation of the antidumping duty order on BSS from Germany would be likely to lead to continuation or recurrence of dumping at the following weighted–average margins:

Manufacturer/Exporter	Margin (percent)
Wieland–Werke AG	3.81
All Others	7.30

This notice serves as the only reminder to parties subject to administrative protective order (''APO'') of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305. Timely notification of return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

We are issuing and publishing these results in accordance with sections 751(c), 752, and 777(i)(1) of the Act.

Dated: January 20, 2006.

David M. Spooner,

Assistant Secretary for Import Administration.

[FR Doc. E6–992 Filed 1–25–06; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

[A–357–812]

Honey from Argentina: Initiation of New Shipper Antidumping Duty Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Initiation of New Shipper Antidumping Duty Review.

EFFECTIVE DATE: January 26, 2006.

FOR FURTHER INFORMATION CONTACT: David Cordell or Robert James, AD/CVD Operations, Office 7, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone: (202) 482–0408 or (202) 482–0469, respectively.

SUPPLEMENTARY INFORMATION:

Background

The Department received a timely request from Patagonik S.A. (Patagonik), in accordance with 19 CFR 351.214(c), for a new shipper review of the antidumping duty order on honey from Argentina. *See Notice of Antidumping Duty Order: Honey from Argentina*, 66 FR 63672 (December 10, 2001). Patagonik identified itself as the exporter of subject merchandise produced by its supplier Colmenares Santa Rosa s.r.l.

As required by 19 CFR 351.214(b)(2)(i),(ii), and (iii)(A), Patagonik certified it did not export honey to the United States during the period of investigation (POI), and that it has never been affiliated with any exporter or producer which exported honey during the POI. As required by 19 CFR 351.214(b)(2)(ii)(B), Patagonik's supplier, Colmenares Santa Rosa s.r.l., certified that it did not export the subject merchandise to the United States during the POI. Our inquires and Customs run queries with U.S. Customs and Border Protection (CBP) show that the shipment entered the United States shortly after the anniversary month.

Under section 351.214(f)(2)(ii) of the Department's regulations, when the sale of the subject merchandise occurs within the period of review (POR), but the entry occurs after the normal POR, the POR may be extended unless it would be likely to prevent the completion of the review within the time limits set by the Department's regulations. The preamble to the Department's regulations states that both the entry and the sale should occur during the POR, and that under ''appropriate'' circumstances the Department has the flexibility to extend the POR. *See Antidumping Duties; Countervailing Duties; Final Rule*, 62 FR 27296, 27319, 27320 (May 19, 1997). In this instance, Patagonik's shipment entered in the month following the end of the POR. The Department does not find that this delay prevents the completion of the review within the time limits set by the Department's regulations. Accordingly, we are extending the POR by one month to capture both the sale and subsequent entry during the New Shipper POR.

Scope

The merchandise under review is honey from the Argentina. The products covered are natural honey, artificial honey containing more than 50 percent natural honey by weight, preparations of natural honey containing more than 50 percent natural honey by weight, and flavored honey. The subject merchandise includes all grades and colors of honey whether in liquid, creamed, comb, cut comb, or chunk form, and whether packaged for retail or in bulk form. The merchandise under

review is currently classifiable under item 0409.00.00, 1702.90.90, and 2106.90.99 of the Harmonized Tariff Schedule of the United States (HTSUS). Although the HTSUS subheading is provided for convenience and customs purposes, the written description of the merchandise under review is dispositive.

Initiation of Review

In accordance with section 751(a)(2)(B) of the Tariff Act of 1930 (the Tariff Act), as amended, and 19 CFR 351.214(d)(1), and based on information on the record, we are initiating a new shipper review for Patagonik. *See Memorandum to the File through Richard O. Weible, ''New Shipper Review Initiation Checklist''*, dated January 31, 2006. We intend to issue the preliminary results of this review not later than 180 days after the date on which this review is initiated, and the final results of this review within 90 days after the date on which the preliminary results are issued.

Pursuant to 19 CFR 351.214(g)(1)(i)(A), the POR for a new shipper review initiated in the month immediately following the anniversary month will be the 12-month period immediately preceding the anniversary month. Under section 351.214(f)(2)(ii) of the Department's regulations, when the sale of the subject merchandise occurs within the POR, but the entry occurs after the normal POR, the POR may be extended unless it would be likely to prevent the completion of the review within the time limits set by the Department's regulations. Therefore, the POR for this new shipper review is December 1, 2004, through December 31, 2005. This review will cover sales by Patagonik of honey produced by Colmenares Santa Rosa s.r.l.

In accordance with section 751(a)(2)(B)(iii) of the Tariff Act, and 19 CFR 351.214(e), we will instruct CBP to allow, at the option of the importer, the posting, until the completion of the review, of a single entry bond or security in lieu of a cash deposit for certain entries of the merchandise exported by the above–listed companies, *i.e*, Patagonik as the exporter and Colmenares Santa Rosa S.R.L as the producer. Thus, we will instruct CBP to limit the bonding option only to entries of subject merchandise exported by Patagonik and produced by Colmenares Santa Rosa S.R.L.

Interested parties seeking access to proprietary information in this new shipper review should submit applications for disclosure under administrative protective orders in accordance with 19 CFR 351.305 and 351.306. This initiation and notice are in accordance with section 751(a) of the Tariff Act and 19 CFR 351.214(d).

Dated: January 20, 2006.

Stephen J. Claeys,

Deputy Assistant Secretary for Import Administration.

[FR Doc. E6–990 Filed 1–25–06; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

[A–122–838]

Initiation of Antidumping Duty Changed Circumstances Review: Certain Softwood Lumber Products from Canada

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

EFFECTIVE DATE: January 26, 2006.

SUMMARY: In accordance with 19 CFR 351.216(b), Weyerhaeuser Company Limited and Weyerhaeuser Saskatchewan Limited (collectively, Weyerhaeuser), Canadian producers of softwood lumber products, filed a request for a changed circumstances review of the antidumping duty order on certain softwood lumber products from Canada, as described below. In response to this request, the Department of Commerce (the Department) is initiating a changed circumstances review of the antidumping duty order on certain softwood lumber from Canada.

FOR FURTHER INFORMATION CONTACT: Salim Bhabhrawala or Constance Handley at (202) 482–1784 or (202) 482–0631, respectively; Office 1, AD/CVD Operations, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230.

SUPPLEMENTARY INFORMATION:

Background

As a result of the second administrative review of the antidumping duty order, imports of softwood lumber from Weyerhaeuser became subject to a cash deposit rate of 4.43 percent (*see Notice of Final Results of Antidumping Duty Administrative Review: Certain Softwood Lumber Products from Canada*, 70 FR 73437 (December 12, 2005)). On December 5, 2005, Weyerhaeuser notified the Department that on May 30, 2005, Weyerhaeuser sold its entire former B.C. Coastal (BCC) business unit. As a result, Weyerhaeuser is requesting that the Department amend its cash deposit rate to reflect this change.

Scope of the Order

The products covered by this order are softwood lumber, flooring and siding (softwood lumber products). Softwood lumber products include all products classified under headings 4407.1000, 4409.1010, 4409.1090, and 4409.1020, respectively, of the Harmonized Tariff Schedule of the United States (HTSUS), and any softwood lumber, flooring and siding described below. These softwood lumber products include:

(1) coniferous wood, sawn or chipped lengthwise, sliced or peeled, whether or not planed, sanded or finger–jointed, of a thickness exceeding six millimeters;

(2) coniferous wood siding (including strips and friezes for parquet flooring, not assembled) continuously shaped (tongued, grooved, rabbeted, chamfered, v–jointed, beaded, molded, rounded or the like) along any of its edges or faces, whether or not planed, sanded or finger–jointed;

(3) other coniferous wood (including strips and friezes for parquet flooring, not assembled) continuously shaped (tongued, grooved, rabbeted, chamfered, v–jointed, beaded, molded, rounded or the like) along any of its edges or faces (other than wood moldings and wood dowel rods) whether or not planed, sanded or finger–jointed; and

(4) coniferous wood flooring (including strips and friezes for parquet flooring, not assembled) continuously shaped (tongued, grooved, rabbeted, chamfered, v–jointed, beaded, molded, rounded or the like) along any of its edges or faces, whether or not planed, sanded or finger–jointed.

Although the HTSUS subheadings are provided for convenience and U.S. Customs and Border Patrol (CBP) purposes, the written description of the merchandise under investigation is dispositive. Preliminary scope exclusions and clarifications were published in three separate **Federal Register** notices.

Softwood lumber products excluded from the scope:

- trusses and truss kits, properly classified under HTSUS 4418.90
- I–joist beams
- assembled box spring frames
- pallets and pallet kits, properly classified under HTSUS 4415.20
- garage doors
- edge–glued wood, properly

classified under HTSUS 4421.90.97.40 (formerly HTSUS 4421.90.98.40)
- properly classified complete door frames
- properly classified complete window frames
- properly classified furniture

Softwood lumber products excluded from the scope only if they meet certain requirements:
- *Stringers* (pallet components used for runners): if they have at least two notches on the side, positioned at equal distance from the center, to properly accommodate forklift blades, properly classified under HTSUS 4421.90.97.40 (formerly HTSUS 4421.90.98.40).
- *Box–spring frame kits*: if they contain the following wooden pieces - two side rails, two end (or top) rails and varying numbers of slats. The side rails and the end rails should be radius–cut at both ends. The kits should be individually packaged, they should contain the exact number of wooden components needed to make a particular box spring frame, with no further processing required. None of the components exceeds 1'' in actual thickness or 83'' in length.
- *Radius–cut box–spring-frame components*, not exceeding 1'' in actual thickness or 83'' in length, ready for assembly without further processing. The radius cuts must be present on both ends of the boards and must be substantial cuts so as to completely round one corner.
- *Fence pickets* requiring no further processing and properly classified under HTSUS 4421.90.70, 1'' or less in actual thickness, up to 8'' wide, 6' or less in length, and have finials or decorative cuttings that clearly identify them as fence pickets. In the case of dog–eared fence pickets, the corners of the boards should be cut off so as to remove pieces of wood in the shape of isosceles right angle triangles with sides measuring 3/4 inch or more.
- *U.S. origin lumber* shipped to Canada for minor processing and imported into the United States, is excluded from the scope of this order if the following conditions are met: (1) the processing occurring in Canada is limited to kiln–drying, planing to create smooth–to-size board, and sanding, and (2) the importer establishes to CBP's satisfaction that the lumber is of U.S. origin.[1]
- *Softwood lumber products contained in single family home packages or kits*,[2] regardless of tariff classification, are excluded from the scope of the orders if the following criteria are met:

1. The imported home package or kit constitutes a full package of the number of wooden pieces specified in the plan, design or blueprint necessary to produce a home of at least 700 square feet produced to a specified plan, design or blueprint;
2. The package or kit must contain all necessary internal and external doors and windows, nails, screws, glue, subfloor, sheathing, beams, posts, connectors and, if included in purchase contract, decking, trim, drywall and roof shingles specified in the plan, design or blueprint;
3. Prior to importation, the package or kit must be sold to a retailer of complete home packages or kits pursuant to a valid purchase contract referencing the particular home design plan or blueprint, and signed by a customer not affiliated with the importer;
4. The whole package must be imported under a single consolidated entry when permitted by CBP, whether or not on a single or multiple trucks, rail cars or other vehicles, which shall be on the same day except when the home is over 2,000 square feet;
5. The following documentation must be included with the entry documents:
   - a copy of the appropriate home design, plan, or blueprint matching the entry;
   - a purchase contract from a retailer of home kits or packages signed by a customer not affiliated with the importer;
   - a listing of inventory of all parts of the package or kit being entered that conforms to the home design package being entered;
   - in the case of multiple shipments on the same contract, all items listed immediately above which are included in the present shipment shall be identified as well.

We have determined that the excluded products listed above are outside the scope of this order provided the specified conditions are met. Lumber products that CBP may classify as stringers, radius cut box–spring-frame components, and fence pickets, not conforming to the above requirements, as well as truss components, pallet components, and door and window frame parts, are covered under the scope of this order and may be classified under HTSUS subheadings 4418.90.40.90, 4421.90.70.40, and 4421.90.98.40. Due to changes in the 2002 HTSUS whereby subheading 4418.90.40.90 and 4421.90.98.40 were changed to 4418.90.45.90 and 4421.90.97.40, respectively, we are adding these subheadings as well.

In addition, this scope language has been further clarified to now specify that all softwood lumber products entered from Canada claiming non–subject status based on U.S. country of origin will be treated as non–subject U.S.-origin merchandise under the antidumping and countervailing duty orders, provided that these softwood lumber products meet the following condition: upon entry, the importer, exporter, Canadian processor and/or original U.S. producer establish to CBP's satisfaction that the softwood lumber entered and documented as U.S.-origin softwood lumber was first produced in the United States as a lumber product satisfying the physical parameters of the softwood lumber scope.[3] The presumption of non–subject status can, however, be rebutted by evidence demonstrating that the merchandise was substantially transformed in Canada.

Initiation of Changed Circumstances Review:

Pursuant to section 751(b)(1) of the Tariff Act of 1930, as amended (the Act), the Department will conduct a changed circumstances review upon receipt of information concerning, or a request from an interested party of, an antidumping duty order which shows changed circumstances sufficient to warrant a review of the order. Weyerhaeuser contends that, because it underwent fundamental structural changes as a result of the sale of BCC, the Department should modify Weyerhaeuser's cash deposit rate to reflect the company's new structure. Based on these circumstances and in accordance with 19 CFR 351.216(b), the Department finds good cause to initiate a changed circumstances review. Therefore, we are initiating a changed circumstances review pursuant to section 751(b)(1) of the Act and 19 CFR 351.216(b) to determine whether Weyerhaeuser should be assigned a different cash deposit rate.

[1] For further clarification pertaining to this exclusion, see the additional language concluding the scope description below.

[2] To ensure administrability, we clarified the language of this exclusion to require an importer certification and to permit single or multiple entries on multiple days, as well as instructing importers to retain and make available for inspection specific documentation in support of each entry.

[3] *See* the scope clarification message (3034202), dated February 3, 2003, to CBP, regarding treatment of U.S.-origin lumber on file in the Central Records Unit, Room B-099 of the main Commerce Building.

The Department will publish in the **Federal Register** a notice of preliminary results of changed circumstances review in accordance with 19 CFR 351.221(b)(4) and 351.221(c)(3)(i), which will set forth the Department's preliminary factual and legal conclusions. The Department will issue its final results of review in accordance with the time limits set forth in 19 CFR 351.216(e).

This notice is in accordance with section 751(b)(1) of the Act and 19 CFR 351.221(b)(1).

Dated: January 19, 2006.

David M. Spooner,

Assistant Secretary for Import Administration.

[FR Doc. E6–988 Filed 1–25–06; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 112205E]

Taking of Marine Mammals Incidental to Specified Activities; Construction of the East Span of the San Francisco-Oakland Bay Bridge

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of proposed authorization for a small take authorization; request for comments.

SUMMARY: NMFS has received a request from the California Department of Transportation (CALTRANS) for renewal of an authorization to take small numbers of California sea lions, Pacific harbor seals, harbor porpoises, and gray whales, by harassment, incidental to construction of a replacement bridge for the East Span of the San Francisco-Oakland Bay Bridge (SF–OBB) in California. Under the Marine Mammal Protection Act (MMPA), NMFS is requesting comments on its proposal to issue an authorization to CALTRANS to incidentally take, by harassment, small numbers of these species of pinnipeds and cetaceans during the next 12 months.

DATES: Comments and information must be received no later than February 27, 2006.

ADDRESSES: Comments on the application should be addressed to Steve Leathery, Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910–3225, or by telephoning the contact listed here. The mailbox address for providing email comments is *PR1.112205E@noaa.gov*. Include in the subject line of the e-mail comment the following document identifier: 112205E. Comments sent via e-mail, including all attachments, must not exceed a 10-megabyte file size. A copy of the 2001 application, the 2005 renewal request, the June 2004 Annual Report and/or the January 2005 Annual Report may be obtained by writing to this address or by telephoning one of the contacts listed here.

FOR FURTHER INFORMATION CONTACT: Shane Guan, NMFS, (301) 713–2289, ext 137, or Monica DeAngelis, NMFS, (562) 980–3232.

SUPPLEMENTARY INFORMATION:

Background

Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are issued or, if the taking is limited to harassment, notice of a proposed authorization is provided to the public for review.

Permission may be granted if NMFS finds that the taking will have no more than a negligible impact on the species or stock(s) and will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses and that the permissible methods of taking and requirements pertaining to the monitoring and reporting of such taking are set forth. NMFS has defined ''negligible impact'' in 50 CFR 216.103 as ''* * * an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.''

Section 101(a)(5)(D) of the MMPA established an expedited process by which citizens of the United States can apply for an authorization to incidentally take small numbers of marine mammals by harassment. Except with respect to certain activities not pertinent here, the MMPA defines ''harassment'' as:

> Any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild [Level A harassment]; or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering [Level B harassment].

Section 101(a)(5)(D) establishes a 45-day time limit for NMFS review of an application followed by a 30-day public notice and comment period on any proposed authorizations for the incidental harassment of small numbers of marine mammals. Within 45 days of the close of the comment period, NMFS must either issue or deny issuance of the authorization.

Summary of Request

On October 17, 2005, CALTRANS sumbitted a request to NOAA requesting renewal of an IHA for the possible harassment of small numbers of California sea lions (*Zalophus californianus*), Pacific harbor seals (*Phoca vitulina richardsii*), harbor porpoises (*Phocoena phocoena*), and gray whales (*Eschrichtius robustus*) incidental to construction of a replacement bridge for the East Span of the SF–OBB, in San Francisco Bay (SFB or the Bay), California. An IHA was issued to CALTRANS for this activity on January 3, 2005 and it expired on January 3, 2006 (70 FR 2123). A detailed description of the SF–OBB project and background information on the issuance of this IHA were provided in the November 14, 2003 (68 FR 64595) **Federal Register** notice and are not repeated here. Please refer to that **Federal Register** notice.

Description of the Marine Mammals Potentially Affected by the Activity

General information on the marine mammal species found in California waters can be found in Caretta *et al.* (2004), which is available at the following URL: *http://www.nmfs.noaa.gov/pr/PR2/Stock_Assessment_Program/ sars.html.* Refer to that document for information on these species.

The marine mammals most likely to be found in the SF–OBB area are the California sea lion, Pacific harbor seal, and harbor porpoise. From December through May gray whales may also be present in the SF–OBB area. Information on California sea lion, harbor seal, and gray whale was provided in the November 14, 2003 (68 FR 64595), **Federal Register** notice and is not repeated here.

Harbor Porpoise

In the eastern North Pacific, harbor porpoise are found in coastal and inland waters from Point Conception,

California to Alaska and along at least the eastern Aleutian chain and eastern Bering Sea (Leatherwood *et al.*, 1988). Along the west coast of the United States, harbor porpoise appear to have much less extensive home range and movement when compared to the same species in the east coast (Calambokidis and Barlow, 1991). Recent genetic analyses of harbor porpoise population structure along the eastern North Pacific indicate that there is small scale subdivision within the U.S. portion of this range (Chivers *et al.*, 2002).

For management purposes, harbor porpoise found in off the coast of central California from San Francisco to Point Arena is treated as a separate stock (San Francisco-Russian River stock). Year-round surveys in the Gulf of the Farallones area have shown harbor porpoise occurrence within 10–20 km (6–12 miles) of San Francisco Bay (Calambokidis *et al.*, 1990). High harbor porpoise sightings were also reported just outside the Golden Gate and about 1 km inside SFB, however, only one harbor porpoise was sighted near the vicinity of the SF-OBB site, around 100 m offshore from Yerba Buena Island on May 19, 2000 (Barrow, personal comm. 2005).

The incidental capture of harbor porpoise in California has largely been limited to set gillnet fisheries in Monterey Bay and to a lesser extent, Morro Bay. One harbor porpoise stranding inside San Francisco Bay in 1998 was attributed to fishery-related mortality, but the responsible fishery is unknown. A ban on set gillnets inshore of 60 fathoms from Point Reyes south to Point Arguello, California has been in place since September 2002.

Potential Effects on Marine Mammals and Their Habitat

CALTRANS and NMFS have determined that open-water pile driving, as outlined in the project description, has the potential to result in behavioral harassment of California sea lions, Pacific harbor seals, harbor porpoises, and gray whales that may be swimming, foraging, or resting in the project vicinity while pile driving is being conducted. Pile driving could potentially harass those few pinnipeds that are in the water close to the project site, whether their heads are above or below the surface.

Based on airborne noise levels measured and on-site monitoring conducted during 2004 under the previous IHA, noise levels from the East Span project did not result in the harassment of harbor seals hauled out on Yerba Buena Island (YBI). Also, noise levels from the East Span project are not expected to result in harassment of the sea lions hauled out at Pier 39 as airborne and waterborne sound pressure levels (SPLs) would attenuate to below harassment levels by the time they reach that haul-out site, 5.7 kilometers (3.5 miles) from the project site.

For reasons provided in greater detail in NMFS' November 14, 2003 (68 FR 64595) **Federal Register** notice and in CALTRANS' June 2004 and January 2005 annual monitoring reports, the East Span Project is resulting in only small numbers of pinnipeds being harassed (through October 2005, the biological observers indicated that only one startle behavior of a sea lion was observed as a result of East Span construction) and, therefore, is not expected to result in more than a negligible impact on marine mammal stocks and will not have a significant impact on their habitat. Short-term impacts to habitat may include minimal disturbance of the sediment where the channels are dredged for barge access and where individual bridge piers are constructed. Long-term impacts to marine mammal habitat will be limited to the footprint of the piles and the obstruction they will create following installation. However, this impact is not considered significant as the marine mammals can easily swim around the piles of the new bridge, as they currently swim around the existing bridge piers.

Mitigation

The following mitigation measures are currently required under the existing IHA to reduce impacts to marine mammals to the lowest extent practicable. NMFS proposes to continue these mitigation measures under a new IHA, if issued.

Barrier Systems

An air bubble curtain system is required to be used only when driving the permanent open-water piles. While the bubble curtain is required specifically as a method to reduce impacts to endangered and threatened fish species in SFB, it may also provide some benefit for marine mammals. The NMFS' Biological Opinion and the California Department of Fish and Game's (CDFG) 2001 Incidental Take Permit also allow for the use of other equally effective methods, such as cofferdams, as an alternative to the air bubble curtain system to attenuate the effects of sound pressure waves on fish during driving of permanent in-Bay piles (NMFS 2001; CDFG, 2001). Piers E–16 through E–7 for both the eastbound and westbound structures of the Skyway will be surrounded by sheet-pile cofferdams, which will be de-watered before the start of pile driving. De-watered cofferdams are generally effective sound attenuation devices. For Piers E3 through E6 of the Skyway and Piers 1 and E2 of the Self-Anchored Suspension span, it is anticipated that cofferdams will not be used; therefore, a bubble curtain will surround the piles.

Sound Attenuation

As a result of the determinations made during the Pile Installation Demonstration Project (PIDP) restrike and the investigation at the Benicia-Martinez Bridge, NMFS determined in 2003 that CALTRANS must install an air bubble curtain for pile driving for the open-water piles without cofferdams located at the SF-OBB. This air bubble curtain system consists of concentric layers of perforated aeration pipes stacked vertically and spaced no more than five vertical meters apart in all tide conditions. The minimum number of layers must be in accordance with water depth at the subject pile: 0–<5 m = 2 layers (1263 cfm); 5–<10 m = 4 layers (2526 cfm), 10–<15 m = 7 layers (4420 cfm); 15–<20 m = 10 layers (6314 cfm); 20–<25 m= 13 layers (8208 cfm). The lowest layer of perforated aeration pipes must be designed to ensure contact at all times and tidal conditions with the mudline without sinking into the bay mud. Pipes in any layer must be arranged in a geometric pattern, which will allow for the pile driving operation to be completely enclosed by bubbles for the full depth of the water column.

To provide a uniform bubble flux, each aeration pipe must have four adjacent rows of air holes along the pipe. Air holes must be 1.6-mm diameter and spaced approximately 20 mm apart. The bubble curtain system will provide a bubble flux of at least two cubic meters per minute, per linear meter of pipeline in each layer. Air holes must be placed in 4 adjacent rows.

The air bubble curtain system must be composed of the following: (1) An air compressor(s), (2) supply lines to deliver the air, (3) distribution manifolds or headers, (4) perforated aeration pipes, and (5) a frame. The frame facilitates transport and placement of the system, keeps the aeration pipes stable, and provides ballast to counteract the buoyancy of the aeration pipes in operation. Meters are required to monitor the operation of the bubble curtain system. Pressure meters will be installed and monitored at all inlets to aeration pipelines and at points of lowest pressure in each branch of the aeration pipeline. If the pressure or flow rate in any meter falls below 90 percent of its operating value, the contractor

will cease pile driving operations until the problem is corrected and the system is tested to the satisfaction of the CALTRANS resident engineer.

Establishment of Safety/Buffer Zones

A safety zone is to be established and monitored to include all areas where the underwater SPLs are anticipated to equal or exceed 190 dB re 1 microPa RMS (impulse) for pinnipeds. Also, a 180-dB re 1 microPa RMS (impulse) safety zone for gray whales and harbor porpoises must be established for pile driving occurring during the gray whale migration season from December through May. Prior to commencement of any pile driving, a preliminary 500-m (1,640-ft) radius safety zone for pinnipeds (California sea lions and Pacific harbor seals) will be established around the pile driving site, as it was for the PIDP. Once pile driving begins, either new safety zones can be established for the 500 kJ and 1700 kJ hammers or the 500 m (1,640 ft) safety zone can be retained. If new safety zones are established based on SPL measurements, NMFS requires that each new safety zone be based on the most conservative measurement (*i.e.*, the largest safety zone configuration). SPLs will be recorded at the 500-m (1,640-ft) contour. The safety zone radius for pinnipeds will then be enlarged or reduced, depending on the actual recorded SPLs.

Observers on boats will survey the safety zone to ensure that no marine mammals are seen within the zone before pile driving of a pile segment begins. If marine mammals are found within the safety zone, pile driving of the segment will be delayed until they move out of the area. If a marine mammal is seen above water and then dives below, the contractor will wait 15 minutes and if no marine mammals are seen by the observer in that time it will be assumed that the animal has moved beyond the safety zone. This 15-minute criterion is based on scientific evidence that harbor seals in San Francisco Bay dive for a mean time of 0.50 minutes to 3.33 minutes (Harvey and Torok, 1994), and the mean diving duration for harbor porpoises ranges from 44 to 103 seconds (Westgate *et al.*, 1995). However, due to the limitations of monitoring from a boat, there can be no assurance that the zone will be devoid of all marine mammals at all times.

Once the pile driving of a segment begins it cannot be stopped until that segment has reached its predetermined depth due to the nature of the sediments underlying the Bay. If pile driving stops and then resumes, it would potentially have to occur for a longer time and at increased energy levels. In sum, this would simply amplify impacts to marine mammals, as they would endure potentially higher SPLs for longer periods of time. Pile segment lengths and wall thickness have been specially designed so that when work is stopped between segments (but not during a single segment), the pile tip is never resting in highly resistant sediment layers. Therefore, because of this operational situation, if seals, sea lions, or harbor porpoises enter the safety zone after pile driving of a segment has begun, pile driving will continue and marine mammal observers will monitor and record marine mammal numbers and behavior. However, if pile driving of a segment ceases for 30 minutes or more and a marine mammal is sighted within the designated safety zone prior to commencement of pile driving, the observer(s) must notify the Resident Engineer (or other authorized individual) immediately and follow the mitigation requirements as outlined previously in this document.

Soft Start

It should be recognized that although marine mammals will be protected from Level A harassment by establishment of an air-bubble curtain and marine mammal observers monitoring a 190-dB safety zone for pinipeds and 180-dB safety zone for cetaceans, mitigation may not be 100 percent effective at all times in locating marine mammals. Therefore, in order to provide additional protection to marine mammals near the project area by allowing marine mammals to vacate the area prior to receiving a potential injury, CALTRANS will also ''soft start'' the hammer prior to operating at full capacity. CALTRANS typically implements a ''soft start'' with several initial hammer strikes at less than full capacity (*i.e.*, approximately 40–60 percent energy levels) with no less than a 1 minute interval between each strike. Similar levels of noise reduction are expected underwater. Therefore, the contractor will initiate hammering of both the 500-kJ and the 1,700-kJ hammers with this procedure in order to allow pinnipeds or cetaceans in the area to voluntarily move from the area, this should expose fewer animals to loud sounds both underwater and above water noise. This would also ensure that, although not expected, any pinnipeds and cetaceans that are missed during safety zone monitoring will not be injured.

Compliance With Equipment Noise Standards

To mitigate noise levels and, therefore, impacts to California sea lions, Pacific harbor seals, harbor porpoises, and gray whales, all construction equipment will comply as much as possible with applicable equipment noise standards of the U.S. Environmental Protection Agency, and all construction equipment will have noise control devices no less effective than those provided on the original equipment.

Monitoring

Since the start of the large-diameter pile driving in the Bay nearly two years ago, CALTRANS has completed pile driving of 105 piles inside cofferdams and 39 piles in open water (with the use of a bubble curtain) for a total of 144 piles. Monitoring teams were on-site for all open water pile driving and during driving of ''tops'' (last section of the piles, which drives the pile deeper into the substrate) inside cofferdams where underwater SPLs reached 190 dB or greater. During 70 days of monitoring, both within and outside the marine mammal safety zone, a single startle behavior from a California sea lion was observed.

The following monitoring measures are currently required under the IHA to reduce impacts to marine mammals to the lowest extent practicable. Unless, as noted, the work has been completed, NMFS proposes to continue those monitoring measures under a new IHA (if issued).

Visual Observations

The area-wide baseline monitoring and the aerial photo survey to estimate the fraction of pinnipeds that might be missed by visual monitoring have been completed under the current IHA and do not need to be continued.

Safety zone monitoring will be conducted during driving of all open-water, permanent piles without cofferdams and with cofferdams when underwater SPLs reach 190 dB RMS or greater. Monitoring of the pinniped and cetacean safety zones will be conducted by a minimum of three qualified NMFS-approved observers for each safety zone. One three-observer team will be required for the safety zones around each pile driving site, so that multiple teams will be required if pile driving is occurring at multiple locations at the same time. The observers will begin monitoring at least 30 minutes prior to startup of the pile driving. Most likely observers will conduct the monitoring from small boats, as observations from a higher vantage point (such as the SF–OBB) is not practical. Pile driving will not begin until the safety zone is clear of marine mammals. However, as described in the Mitigation section,

once pile driving of a segment begins, operations will continue uninterrupted until the segment has reached its predetermined depth. However, if pile driving of a segment ceases for 30 minutes or more and a marine mammal is sighted within the designated safety zone prior to commencement of pile driving, the observer(s) must notify the Resident Engineer (or other authorized individual) immediately and follow the mitigation requirements as outlined previously (see Mitigation). Monitoring will continue through the pile driving period and will end approximately 30 minutes after pile driving has been completed. Biological observations will be made using binoculars during daylight hours.

In addition to monitoring from boats, during open-water pile driving, monitoring at one control site (harbor seal haul-out sites and the waters surrounding such sites not impacted by the East Span Project's pile driving activities, *i.e.* Mowry Slough) will be designated and monitored for comparison. Monitoring will be conducted twice a week at the control site whenever open-water pile driving is being conducted. Data on all observations will be recorded and will include items such as species, numbers, behavior, details of any observed disturbances, time of observation, location, and weather. The reactions of marine mammals will be recorded based on the following classifications that are consistent with the Richmond Bridge Harbor Seal survey methodology (for information on the Richmond Bridge authorization, *see* 68 FR 66076, November 25, 2003): (1) No response, (2) head alert (looks toward the source of disturbance), (3) approach water (but not leave), and (4) flush (leaves haul-out site). The number of marine mammals under each disturbance reaction will be recorded, as well as the time when seal re-haul after a flush.

Acoustical Observations

Airborne noise level measurements have been completed and underwater environmental noise levels will continue to be measured as part of the East Span Project. The purpose of the underwater sound monitoring is to establish the safety zone of 190 dB re 1 micro-Pa RMS (impulse) for pinnipeds and the safety zone of 180 dB re 1 micro-Pa RMS (impulse) for cetaceans. Monitoring will be conducted during the driving of the last half (deepest pile segment) for any given open-water pile. One pile in every other pair of pier groups will be monitored. One reference location will be established at a distance of 100 m (328 ft) from the pile driving. Sound measurements will be taken at the reference location at two depths (a depth near the mid-water column and a depth near the bottom of the water column but at least 1 m (3 ft) above the bottom) during the driving of the last half (deepest pile segment) for any given pile. Two additional in-water spot measurements will be conducted at appropriate depths (near mid-water column), generally 500 m (1,640 ft) in two directions either west, east, south or north of the pile driving site will be conducted at the same two depths as the reference location measurements. In cases where such measurements cannot be obtained due to obstruction by land mass, structures or navigational hazards, measurements will be conducted at alternate spot measurement locations. Measurements will be made at other locations either nearer or farther as necessary to establish the approximate distance for the safety zones. Each measuring system shall consist of a hydrophone with an appropriate signal conditioning connected to a sound level meter and an instrument grade digital audiotape recorder (DAT). Overall SPLs shall be measured and reported in the field in dB re 1 micro-Pa RMS (impulse). An infrared range finder will be used to determine distance from the monitoring location to the pile. The recorded data will be analyzed to determine the amplitude, time history and frequency content of the impulse.

Reporting

Under the current IHA, CALTRANS has submitted weekly marine mammal monitoring reports and in January, 2005, CALTRANS submitted its Marine Mammal and Acoustic Monitoring for the Eastbound Structure. This annual report is available by contacting NMFS (see **ADDRESSES**) or on the Web at *http://biomitigation.org.*

Under the proposed IHA, coordination with NMFS will occur on a weekly basis, or more often as necessary. During periods with open-water pile driving activity, weekly monitoring reports will be made available to NMFS and the public at *http://biomitigation.org.* These weekly reports will include a summary of the previous week's monitoring activities and an estimate of the number of seals and sea lions that may have been disturbed as a result of pile driving activities.

In addition, CALTRANS proposes to provide NMFS' Southwest Regional Administrator with a draft final report within 90 days after completion of the westbound Skyway contract and 90 days after completion of the Suspension Span foundations contract. This report should detail the monitoring protocol, summarize the data recorded during monitoring, and estimate the number of marine mammals that may have been harassed due to pile driving. If comments are received from the Regional Administrator on the draft final report, a final report must be submitted to NMFS within 30 days thereafter. If no comments are received from NMFS, the draft final report will be considered to be the final report.

National Environmental Policy Act (NEPA)

NMFS has prepared an Environmental Assessment (EA) and made a Finding of No Significant Impact (FONSI). Therefore, preparation of an environmental impact statement on this action is not required by section 102(2) of the NEPA or its implementing regulations. A copy of the EA and FONSI are available upon request (see **ADDRESSES**).

Endangered Species Act (ESA)

On October 30, 2001, NMFS completed consultation under section 7 of the ESA with the Federal Highway Administration (FHWA) on the CALTRANS' construction of a replacement bridge for the East Span of the SF–OBB in California. The finding contained in the Biological Opinion was that the proposed action at the East Span of the SF–OBB is not likely to jeopardize the continued existence of listed anadromous salmonids, or result in the destruction or adverse modification of designated critical habitat for these species. Listed marine mammals are not expected to be in the area of the action and thus would not be affected. However, the proposed issuance of an IHA to CALTRANS constitutes an agency action that authorizes an activity that may affect ESA-listed species and, therefore, is subject to section 7 of the ESA. Moreover, as the effects of the activities on listed salmonids were analyzed during a formal consultation between the FHWA and NMFS, and as the underlying action has not changed from that considered in the consultation, the discussion of effects that are contained in the Biological Opinion issued to the FHWA on October 30, 2001, pertains also to this action. In conclusion, NMFS has determined that issuance of an IHA for this activity does not lead to any effects to listed species apart from those that were considered in the consultation on FHWA's action.

Preliminary Determinations

For the reasons discussed in this document and in previously identified

supporting documents, NMFS has preliminarily determined that the impact of pile driving and other activities associated with construction of the East Span Project should result, at worst, in the Level B harassment of small numbers of California sea lions, Pacific harbor seals, harbor porpoises, and potentially gray whales that inhabit or visit SFB in general and the vicinity of the SF–OBB in particular. While behavioral modifications, including temporarily vacating the area around the construction site, may be made by these species to avoid the resultant visual and acoustic disturbance, the availability of alternate areas within SFB and haul-out sites (including pupping sites) and feeding areas within the Bay has led NMFS to preliminarily determine that this action will have a negligible impact on California sea lion, Pacific harbor seal, harbor porpoises, and gray whale populations along the California coast.

In addition, no take by Level A harassment (injury) or death is anticipated and harassment takes should be at the lowest level practicable due to incorporation of the mitigation measures mentioned previously in this document.

Proposed Authorization

NMFS proposes to issue an IHA to CALTRANS for the potential harassment of small numbers of harbor seals, California sea lions, harbor porpoises, and gray whales incidental to construction of a replacement bridge for the East Span of the San Francisco-Oakland Bay Bridge in California, provided the previously mentioned mitigation, monitoring, and reporting requirements are incorporated. NMFS has preliminarily determined that the proposed activity would result in the harassment of only small numbers of harbor seals, California sea lions, harbor porpoises, and possibly gray whales and will have no more than a negligible impact on these marine mammal stocks.

Information Solicited

NMFS requests interested persons to submit comments, information, and suggestions concerning this request (see **ADDRESSES**). Prior to submitting comments, NMFS recommends reviewers of this document read NMFS' November 14, 2003 **Federal Register** notice (68 FR 64595) on this action, especially responses to comments made previously, as NMFS does not intend to address these issues further without the submission of additional scientific information relevant to the comment.

Dated: January 17, 2006.

Jim Lecky,

Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. E6–1008 Filed 1–25–06; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF EDUCATION

Notice of Proposed Information Collection Requests

AGENCY: Department of Education

SUMMARY: The IC Clearance Official, Regulatory Information Management Services, Office of the Chief Information Officer, invites comments on the proposed information collection requests as required by the Paperwork Reduction Act of 1995.

DATES: Interested persons are invited to submit comments on or before March 27, 2006.

SUPPLEMENTARY INFORMATION: Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. OMB may amend or waive the requirement for public consultation to the extent that public participation in the approval process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its statutory obligations. The IC Clearance Official, Regulatory Information Management Services, Office of the Chief Information Officer, publishes that notice containing proposed information collection requests prior to submission of these requests to OMB. Each proposed information collection, grouped by office, contains the following: (1) Type of review requested, *e.g.* new, revision, extension, existing or reinstatement; (2) Title; (3) Summary of the collection; (4) Description of the need for, and proposed use of, the information; (5) Respondents and frequency of collection; and (6) Reporting and/or Recordkeeping burden. OMB invites public comment.

The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology.

Dated: January 20, 2006.

Angela C. Arrington,

IC Clearance Official, Regulatory Information Management Services, Office of the Chief Information Officer.

Office of Postsecondary Education

Type of Review: Extension.

Title: FIPSE: Brazil, North America, EU-U.S. Consolidated Forms.

Frequency: Annually.

Affected Public: Not-for-profit institutions.

Reporting and Recordkeeping Hour Burden:

Responses: 110.

Burden Hours: 780.

Abstract: These three special focus international programs promote multilateral, international curricular development, student recruitment and exchange, credit recognition, and tuition reciprocity in a wide range of academic disciplines for undergraduate and graduate students and faculty.

Requests for copies of the proposed information collection request may be accessed from *http://www.edicsweb.ed.gov*, by selecting the ''Browse Pending Collections'' link and by clicking on link number 2973. When you access the information collection, click on ''Download Attachments'' to view. Written requests for information should be addressed to U.S. Department of Education, 400 Maryland Avenue, SW., Potomac Center, 9th Floor, Washington, DC 20202–4700. Requests may also be electronically mailed to IC *DocketMgr@ed.gov* or faxed to 202–245–6623. Please specify the complete title of the information collection when making your request.

Comments regarding burden and/or the collection activity requirements should be electronically mailed to the e-mail address IC *DocketMgr@ed.gov*. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

[FR Doc. E6–974 Filed 1–25–06; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EC06–64–000]

Burney Forest Products, A Joint Venture, Woodgreen Power LLC, USPF II Burney, LP; Notice of Filing

January 20, 2006.

Take notice that on January 13, 2006, DCTC-Burney, Inc. (DCTC), a Delaware corporation and Woodgreen Power LLC, (Woodgreen) a Delaware limited liability company (collectively, Sellers) requesting for themselves and on behalf of Burney Forest Products, A Joint Venture, a California general partnership (BFP) and USPF II Burney, LP (Buyer), tendered for filing an application requesting all necessary authorizations under section 203 of the Federal Power Act, for an indirect transfer of jurisdictional facilities involving the sale by Sellers and the purchase by Buyer and purchase by Bankers Commercial Corporation of a passive, approximately twenty-five percent indirect interest in BFP.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. On or before the comment date, it is not necessary to serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov*. Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov*, using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. Eastern Time on February 3, 2006.

Magalie R. Salas,

Secretary.

[FR Doc. E6–985 Filed 1–25–06; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP06–48–000]

Dominion Transmission, Inc.; Notice of Application

January 19, 2006.

Take notice that on January 9, 2006, Dominion Transmission, Inc. (DTI), 120 Tredegar Street, Richmond, Virginia 23219, filed in Docket No. CP06–48–000 an application pursuant to section 7 of the Natural Gas Act and part 157 the Commission's Rules and Regulations for all the necessary authorizations required to abandon, transfer, and reclassify approximately 62 miles of low pressure, small diameter pipeline; various meters and appurtenant facilities located in West Virginia. DTI states that concurrently with the submission of this application, it is also submitting an application under section 4 of the NGA seeking approval for the rate treatment associated with the reclassified facilities, all as more fully set forth in the application which is on file with the Commission and open to public inspection. This filing may be also viewed on the Web at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, call (866) 208–3676 or TTY, (202) 502–8659.

Questions regarding this application should be directed to Anne E. Bomar, Managing Director, Transmission Rates and Regulation, Dominion Resources, Inc., 120 Tredegar Street, Richmond, Virginia 23289, or call (804) 819–2134.

There are two ways to become involved in the Commission's review of this project. First, any person wishing to obtain legal status by becoming a party to the proceedings for this project should, before the comment date of this notice, file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, a motion to intervene in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) and the Regulations under the NGA (18 CFR 157.10). A person obtaining party status will be placed on the service list maintained by the Secretary of the Commission and will receive copies of all documents filed by the applicant and by all other parties. A party must submit 14 copies of filings made with the Commission and must mail a copy to the applicant and to every other party in the proceeding. Only parties to the proceeding can ask for court review of Commission orders in the proceeding.

However, a person does not have to intervene in order to have comments considered. The second way to participate is by filing with the Secretary of the Commission, as soon as possible, an original and two copies of comments in support of or in opposition to this project. The Commission will consider these comments in determining the appropriate action to be taken, but the filing of a comment alone will not serve to make the filer a party to the proceeding. The Commission's rules require that persons filing comments in opposition to the project provide copies of their protests only to the party or parties directly involved in the protest.

Comments, protests and interventions may be filed electronically via the Internet in lieu of paper. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link.

Comment Date: February 9, 2006.

Magalie R. Salas,

Secretary.

[FR Doc. E6–955 Filed 1–25–06; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EC06–53–000]

El Paso Marketing, L.P.; Notice of Filing

January 20, 2006.

Take notice that on January 17, 2006, El Paso Marketing, L.P. submitted an application under section 203 of the Federal Power Act seeking authorization to transfer certain power sales agreements to Morgan Stanley Capital Group, Inc. to become a co-applicant and agrees with the description of the Proposed Transaction.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and

Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. On or before the comment date, it is not necessary to serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov*. Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov*, using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. Eastern Time on January 30, 2006.

Magalie R. Salas,

Secretary.

[FR Doc. E6–984 Filed 1–25–06; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP06–45–000]

Northwest Pipeline Corporation; Notice of Application

January 20, 2006.

Take notice that on January 4, 2006, Northwest Pipeline Corporation (Northwest), 295 Chipeta Way, Salt Lake City, Utah 84158, filed an abbreviated application, pursuant to section 7(c) of the Natural Gas Act (NGA) and Part 157 of the Commission's Rules and Regulations for a certificate of public convenience and necessity authorizing Northwest to construct and operate its ''Parachute Lateral Project'' to transport up to 450,000 Dth per day for Williams Power Company, Inc. The Parachute Lateral Project will consist of: (1) Approximately 37.6 miles of 30-inch pipeline and appurtenant facilities in Garfield and Rio Blanco counties, Colorado, extending from Williams Production RMT Company Inc.'s (E&P) Parachute gas processing plant facilities to interconnects with Wyoming Interstate Company (WIC) and Colorado Interstate Gas Company (CIG), at the Greasewood Hub in Rio Blanco County, Colorado; and (2) the Starkey Gulch Receipt Meter Station, located at E&P's Parachute plant in Garfield County, Colorado, all as more fully set forth in the application which is on file with the Commission and open for public inspection. These filings are available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll free at (866) 208–3676, or for TTY, contact (202) 502–8659.

Any questions regarding this application may be directed to Steven W. Snarr, General Counsel, Northwest Pipeline Corporation, P.O. Box 58900, Salt Lake City, Utah 84158–0900 at (801) 584–7094 or by fax at (801) 584–7862 or Gary K. Kotter, Manager, Certificates and Tariffs, Northwest Pipeline Corporation, P.O. Box 58900, Salt Lake City, Utah 84158–0900, at (801) 584–7117 or by fax at (801) 584–7764.

Northwest states that the proposed facilities will have a firm design capacity of 450,000 Dth per day and an estimated total cost of $55.1 million. In order to meet a November 2006 in-service, Northwest requests that the Commission issue a final certificate order by July 1, 2006.

There are two ways to become involved in the Commission's review of this project. First, any person wishing to obtain legal status by becoming a party to the proceedings for this project should, on or before the below listed comment date, file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, a motion to intervene in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) and the Regulations under the NGA (18 CFR 157.10). A person obtaining party status will be placed on the service list maintained by the Secretary of the Commission and will receive copies of all documents filed by the applicant and by all other parties. A party must submit 14 copies of filings made with the Commission and must mail a copy to the applicant and to every other party in the proceeding. Only parties to the proceeding can ask for court review of Commission orders in the proceeding.

However, a person does not have to intervene in order to have comments considered. The second way to participate is by filing with the Secretary of the Commission, as soon as possible, an original and two copies of comments in support of or in opposition to this project. The Commission will consider these comments in determining the appropriate action to be taken, but the filing of a comment alone will not serve to make the filer a party to the proceeding. The Commission's rules require that persons filing comments in opposition to the project provide copies of their protests only to the party or parties directly involved in the protest.

Persons who wish to comment only on the environmental review of this project should submit an original and two copies of their comments to the Secretary of the Commission. Environmental commenters will be placed on the Commission's environmental mailing list, will receive copies of the environmental documents, and will be notified of meetings associated with the Commission's environmental review process. Environmental commenters will not be required to serve copies of filed documents on all other parties. However, the non-party commenters will not receive copies of all documents filed by other parties or issued by the Commission (except for the mailing of environmental documents issued by the Commission) and will not have the right to seek court review of the Commission's final order.

Motions to intervene, protests and comments may be filed electronically via the Internet in lieu of paper; see, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link. The Commission strongly encourages electronic filings.

Comment Date: February 10, 2006.

Magalie R. Salas,

Secretary.

[FR Doc. E6–983 Filed 1–25–06; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EL05–107–000]

Oklahoma Gas and Electric Company; OGE Energy Resources, Inc.; Notice of Institution of Proceeding and Refund Effective Date

January 20, 2006.

On June 7, 2005, the Commission issued an order that instituted a proceeding in Docket No. EL05–107–000, pursuant to section 206 of the Federal Power Act (FPA), 15 U.S.C. 824e, concerning the justness and reasonableness of the OGE Companies market-based rates in the OG&E control area.[1]

The refund effective date in Docket No. EL05–107–000, established pursuant to section 2069(b) of the FPA, will be 60 days from the date of publication of this notice in the **Federal Register**.

Magalie R. Salas,

Secretary.

[FR Doc. E6–986 Filed 1–25–06; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER06–407–000]

PJM Interconnection, L.L.C.; Notice of Filing

January 4, 2006.

Take notice that on December 28, 2005, PJM Interconnection, L.L.C. (PJM) submitted for filing an unexecuted interconnection service agreement (ISA) among PJM; GSG, LLC; and Commonwealth Edison Company, designated as Original Service Agreement No. 1407. PJM requests a waiver of the Commission's 60-day notice requirement to permit a December 23, 2005 effective date for the ISA, and asks the Commission for expedited action and a shortened comment period.

PJM states that copies of this filing were served upon the parties to the ISA and the state regulatory commissions within the PJM region.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. On or before the comment date, it is not necessary to serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov*, using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. Eastern Time on January 9, 2006.

Magalie R. Salas,

Secretary.

[FR Doc. E6–954 Filed 1–25–06; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 1893]

Public Service Company of New Hampshire; Notice of Authorization for Continued Project Operation

January 19, 2006.

On December 29, 2003, the Public Service Company of New Hampshire, licensee for the Merrimack River Hydroelectric Project No. 1893, filed an application for a new or subsequent license pursuant to the Federal Power Act (FPA) and the Commission's regulations there under. Project No. 1893 is located on the Merrimack River in Hillsborough and Merrimack Counties, New Hampshire.

The license for Project No. 1893 was issued for a period ending December 31, 2005. Section 15(a)(1) of the FPA, 16 U.S.C. 808(a)(1), requires the Commission, at the expiration of a license term, to issue from year to year an annual license to the then licensee under the terms and conditions of the prior license until a new license is issued, or the project is otherwise disposed of as provided in section 15 or any other applicable section of the FPA. If the project's prior license waived the applicability of section 15 of the FPA, then, based on section 9(b) of the Administrative Procedure Act, 5 U.S.C. 558(c), and as set forth at 18 CFR 16.21(a), if the licensee of such project has filed an application for a subsequent license, the licensee may continue to operate the project in accordance with the terms and conditions of the license after the minor or minor part license expires, until the Commission acts on its application. If the licensee of such a project has not filed an application for a subsequent license, then it may be required, pursuant to 18 CFR 16.21(b), to continue project operations until the Commission issues someone else a license for the project or otherwise orders disposition of the project.

If the project is subject to section 15 of the FPA, notice is hereby given that an annual license for Project No. 1893 is issued to the Public Service Company of New Hampshire for a period effective January 1, 2006 through December 31, 2006, or until the issuance of a new license for the project or other disposition under the FPA, whichever comes first. If issuance of a new license (or other disposition) does not take place on or before December 1, 2006, notice is hereby given that, pursuant to 18 CFR 16.18(c), an annual license under section 15(a)(1) of the FPA is renewed automatically without further order or notice by the Commission, unless the Commission orders otherwise.

If the project is not subject to section 15 of the FPA, notice is hereby given that the Public Service Company of New Hampshire is authorized to continue operation of the Merrimack River Hydroelectric Project No. 1893 until such time as the Commission acts on its application for subsequent license.

Magalie R. Salas,

Secretary.

[FR Doc. E6–952 Filed 1–25–06; 8:45 am]

BILLING CODE 6717–01–P

[1] *Oklahoma Gas and Electric Company and OGE Resources, Inc.,* 111 FERC § 61,368 (2005). The OGE Companies are Oklahoma Gas and Electric Company and OGE Energy Resources.

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EL06–32–000]

City of Vernon, California v. Mirant Americas Energy Marketing, L.P.; Notice of Filing

January 20, 2006.

Take notice that on January 11, 2006, the City of Vernon, submitted revisions to its Transmission Revenue Balancing Account Adjustment for the calendar year 2006.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. On or before the comment date, it is not necessary to serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov*. Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible online at *http://www.ferc.gov*, using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. Eastern Time on January 30, 2006.

Magalie R. Salas,

Secretary.

[FR Doc. E6–982 Filed 1–25–06; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice of Filings

Thursday, January 19, 2006.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER06–285–000; ER06–286–000.

Applicants: Cincinnati Gas & Electric Company.

Description: The Cincinnati Gas & Electric Co & PSI Energy, Inc notifies FERC of its withdrawal of the Legacy Contract Transmission Agreement submitted on 12/1/05.

Filed Date: 01/13/2006.

Accession Number: 20060118–0186.

Comment Date: 5 p.m. Eastern Time on Friday, February 3, 2006.

Docket Numbers: ER06–379–001.

Applicants: Commonwealth Edison Co.

Description: ComEd and Midwest Generation LLC submits Attachment A Letter Agreement; Attachment B, Clean Copy of FIEA; and Exhibits Reflecting Changes Made by the Letter Agreement.

Filed Date: 01/12/2006.

Accession Number: 20060117–0222.

Comment Date: 5 p.m. Eastern Time on Thursday, February 2, 2006.

Docket Numbers: ER06–471–000.

Applicants: Pacific Gas & Electric Company.

Description: Pacific Gas and Electric Co submits an amendment to the Generator Special Facilities Agreement with Mirant Delta, LLC.

Filed Date: 01/12/2006.

Accession Number: 20060113–0126.

Comment Date: 5 p.m. Eastern Time on Thursday, February 2, 2006.

Docket Numbers: ER06–477–000.

Applicants: Aquila, Inc.

Description: Aquila, Inc dba Aquila Networks, LP files a proposed facilities modifications & construction agreement for the Cooper South Flowgate Upgrades.

Filed Date: 01/12/2006.

Accession Number: 20060117–0215.

Comment Date: 5 p.m. Eastern Time on Thursday, February 2, 2006.

Docket Numbers: ER06–478–000.

Applicants: Southern Company Services, Inc.

Description: Southern Company Services, Inc acting as agent for Alabama Power Co et al submits service agreements for network integration transmission service with Southern Company Generation et al.

Filed Date: 01/13/2006.

Accession Number: 20060117–0304.

Comment Date: 5 p.m. Eastern Time on Friday, February 3, 2006.

Docket Numbers: ER06–479–000.

Applicants: Kansas City Power & Light Company.

Description: Kansas City Power & Light Co submits compliance filing related to Order 661 & 661–A.

Filed Date: 01/13/2006.

Accession Number: 20060117–0216.

Comment Date: 5 p.m. Eastern Time on Friday, February 3, 2006.

Docket Numbers: ER06–480–000.

Applicants: Pacific Gas and Electric Company.

Description: Pacific Gas & Electric Co submits transmission access charge balancing account revisions.

Filed Date: 01/13/2006.

Accession Number: 20060117–0217.

Comment Date: 5 p.m. Eastern Time on Friday, February 3, 2006

Docket Numbers: ER94–1188–037.

Applicants: LG&E Energy Marketing Inc.

Description: LG&E Energy Marketing Inc resubmits corrections for certain sheets for 1/03/06 of its market-based rate tariff.

Filed Date: 01/12/2006.

Accession Number: 20060113–0080.

Comment Date: 5 p.m. Eastern Time on Thursday, February 2, 2006.

Any person desiring to intervene or to protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214) on or before 5 p.m. Eastern time on the specified comment date. It is not necessary to separately intervene again in a subdocket related to a compliance filing if you have previously intervened in the same docket. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant. In reference to filings initiating a new proceeding, interventions or protests submitted on or before the comment deadline need not be served on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov*. To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling

link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First St., NE., Washington, DC 20426.

The filings in the above proceedings are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*. or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Magalie R. Salas,

Secretary.

[FR Doc. E6–951 Filed 1–25–06; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. AD06–2–000; ER06–406–000; ER02–2330–040; ER03–345–006; ER01–3001–014]

Supplemental Notice of Technical Conference; Assessment of Demand Response Resources; PJM Interconnection, L.L.C.; ISO New England Inc.; ISO New England Inc.; New York Independent Transmission System Operator, Inc.

January 20, 2006.

This supplemental notice provides additional information for a technical conference to be held on Wednesday, January 25, 2006, at 9 a.m. (EST),[1] on demand response and advanced metering regarding issues raised by the Energy Policy Act of 2005 (EPAct 2005) section 1252(e)(3).[2] This notice includes additional dockets numbers because those filings all contain issues associated with demand response and those issues may be discussed within presentations. The technical conference will be held in the Commission Meeting Room at the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. The conference will be open for the public to attend and advance registration is not required. This will be a staff conference, but Commissioners may attend.

The conference will be transcribed. A transcript of the conference will be immediately available from Ace Reporting Company (202) 347–3700 or (800) 336–6646 for a fee. It will be available to the public on the Commission's eLibrary system seven calendar days after the Commission receives the transcript.

Commission conferences are accessible under section 508 of the Rehabilitation Act of 1973. For accessibility accommodations please send an e-mail to *accessibility@ferc.gov* or call toll free 866–208–3372 (voice) or 202–208–1659 (TTY), or send a FAX to 202–208–2106 with the required accommodations.

For further information on the technical conference, please contact:

David Kathan (Technical Information), Office of Markets, Tariffs and Rates, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. (202) 502–6404. *David.Kathan@ferc.gov*.

Aileen Roder (Legal Information), Office of the General Counsel, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. (202) 502–6022. *Aileen.Roder@ferc.gov*.

Magalie R. Salas,

Secretary.

[FR Doc. E6–987 Filed 1–25–06; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. ER05–1410–000; and EL05–148–000]

PJM Interconnection, LLC; Supplemental Notice of Commission Technical Conference

January 19, 2006.

As announced in the Notice of Commission Technical Conference issued on December 8, 2005, the Commission will hold a technical conference on February 3, 2006 at the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC, on the matters raised by the Reliability Pricing Model (RPM) filed in the above-captioned dockets by PJM Interconnection, LLC (PJM). This supplemental notice provides additional information and an agenda for the conference. Members and staff of the Federal Energy Regulatory Commission are expected to participate. The conference will be open for the public to attend. The conference will be held in the Commission Meeting Room, with overflow to Hearing Room One.

The conference will be transcribed. A transcript of the conference will be immediately available from Ace Reporting Company (202) 347–3700 or (800) 336–6646 for a fee. It will be available for the public on the Commission's eLibrary system seven calendar days after FERC receives the transcript.

A free webcast of this event is available through *http://www.ferc.gov.* Anyone with Internet access who wishes to view this event may do so by navigating to *http://www.ferc.gov*'s Calendar of Events and locating this event in the Calendar. The event will contain a link to its webcast. The Capitol Connection provides technical support for the webcasts. It also offers access to this event via television in the Washington, DC area and via phone bridge for a fee. Visit *http://www.CapitolConnection.org*, or contact Danelle Perkowski or David Reininger at the Capitol Connection (703) 993–3100 for information about this service.

FERC conferences are accessible under section 508 of the Rehabilitation Act of 1973. For accessibility accommodations please send an e-mail to *accessibility@ferc.gov* or call toll free 866–208–3372 (voice) or 202–208–1659 (TTY), or send a FAX to 202–208–2106 with the required accommodations.

For further information regarding this conference, contact John McPherson at *John.McPherson@ferc.gov* or Katherine Waldbauer at *Katherine.Waldbauer@ferc.gov.*

Magalie R. Salas,

Secretary.

Reliability Pricing Model in PJM Commission Technical Conference Agenda [1]

February 3, 2006.

Welcome from Chairman Joseph T. Kelliher:
10 a.m.–10:15 a.m.

Introduction:
10:15 a.m.–10:45 a.m.

The Commission requests that PJM present a brief factual overview of PJM's current infrastructure. This presentation will include information regarding location, age and efficiency of

[1] The initial notice setting the date of this technical conference was issued on December 12, 2005. 70 FR 74,804 (2005). An additional notice setting forth the agenda and procedures for the technical conference was issued on January 13, 2006.

[2] Energy Policy Act of 2005, Public Law No. 109–58, § 1252(e)(3), 119 Stat. 594 (2005).

[1] Both this schedule and the list of panelists may change. The Commission will issue a further notice of such changes if time permits.

generation, transmission constraints, proposed new transmission construction, demand response and new generation projects as they relate to PJM's current and forecasted reliability needs. The Commission further requests that PJM summarize the main components of RPM. (A representative of PJM will be present during each subsequent panel to answer questions, but PJM will not make any further independent presentation.)

PJM Interconnection, LLC: Audrey A. Zibelman, Executive Vice President & Chief Operating Officer, and Andrew L. Ott, Vice President—Markets.

Panel 1:

10:45 a.m.–1 p.m.

Whether the current capacity obligation construct within PJM's market design provides for just and reasonable wholesale power prices in the PJM footprint, at levels that provide adequate assurance that necessary resources will be provided to assure reliability, or whether changes must be made to that capacity obligation construct.

Dayton Power and Light Company: Gary Stephenson, Vice President, Commercial Operations.

Edison Mission Companies: Reem Fahey, Vice President, Market Policy.

Exelon Corporation: John F. Young, Executive Vice President, Finance and Markets and Chief Financial Officer.

FirstEnergy Service Company: Michael R. Beiting, Associate General Counsel.

Public Utilities Commission of Ohio: Hon. Alan R. Schriber, Chair.

Pennsylvania Public Utility Commission: Andrew S. Tubbs, Counsel.

Maryland Office of People's Counsel: William Fields, Senior Assistant People's Counsel.

Lunch

1 p.m.–2 p.m.

Panel 2:

2 p.m.–3:30 p.m.

Whether PJM's RPM proposal would provide for just and reasonable wholesale power prices in the PJM footprint, at levels that provide adequate reliability, or whether changes must be made to the proposal to meet those goals.

PSEG Companies: Gary R. Sorenson, Managing Director, Energy Operations, PSEG Power LLC.

Reliant Energy, Inc.: Neal A. Fitch, Senior Regulatory Specialist.

Mirant Parties/NRG Companies/ Williams: Robert B. Stoddard, Vice President, Charles River Associates, International.

Constellation Energy Group: Marjorie R. Philips, Vice President, Regulatory Affairs.

National Grid USA: Mary Ellen Paravalos, Director of Regulatory Policy.

PJM Industrial Customer Coalition: Robert A. Weishaar, McNees, Wallace and Nurick, LLC.

New Jersey Board of Public Utilities: Hon. Frederick T. Butler, Commissioner.

Virginia Office of the Attorney General: Seth W. Brown, Manager of Transmission Services, GDS Associates, Inc.

Panel 3:

3:30 p.m.–4:45 p.m.

Whether an alternative approach to RPM is necessary to ensure just and reasonable wholesale power prices in the PJM footprint.

American Electric Power Service Co.: J. Craig Baker, Senior Vice President, Regulatory Services.

Morgan Stanley Capital Group Inc.: James Sheffield, Vice President.

Coalition of Consumers for Reliability: Edward D. Tatum, Jr., Assistant Vice President, Rates and Regulation, Old Dominion Electric Cooperative (ODEC).

PPL Parties: Thomas Hyzinski, Manager, ISO Markets Development and Regulatory Policy.

Delaware Public Service Commission: Hon. Arnetta McRae, Chair.

Closing remarks by Chairman Joseph T. Kelliher:

4:45 p.m.–5 p.m.

Each panelist should provide a presentation of no more than five minutes, and the Commissioners may ask questions at the conclusion of each presentation. If time permits, the audience may also ask questions of the panelists at the conclusion of the Commissioners' questions. Panelists wishing to distribute copies of their presentation should bring 100 or more hard copies to the conference for distribution. Any such presentation will be placed into the record for these dockets. Any panelist requiring particular software or other technical facilities for a presentation should contact FERC staff no later than January 27, 2006. All parties to this proceeding may file comments on the technical conference by close of business on February 23, 2006.

[FR Doc. E6–953 Filed 1–25–06; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. PL02–6–001]

Before Commissioners: Joseph T. Kelliher, Chairman; Nora Mead Brownell, and Suedeen G. Kelly; Natural Gas Pipeline Negotiated Rate Policies and Practices; Order on Rehearing and Clarification

Issued January 19, 2006.

1. Several parties [1] request rehearing and or clarification of the Commission's July 9, 2003 Order in the captioned docket.[2] In that order, the Commission modified its negotiated rate policies so that pipelines would no longer be permitted to enter into negotiated rate agreements that utilize basis differentials as a transportation pricing mechanism.

Background

2. In 1996, the Commission permitted pipelines the opportunity to use negotiated rates as an alternative to cost-of-service ratemaking.[3] Under the negotiated rate program, the pipeline and a shipper may negotiate rates that vary from a pipeline's otherwise applicable cost-of-service tariff rate. However, a cost-based recourse rate must be maintained by the pipeline for customers that prefer traditional cost-of-service rates and to mitigate market power if the pipeline unilaterally demands excess prices or withholds service. The Commission determined that the availability of the recourse rate would prevent pipelines from exercising market power by assuring that the customer always has the option of purchasing capacity at the just and reasonable tariff rate if the pipeline unilaterally demands excessive prices.[4]

[1] Parties requesting rehearing or clarification are: Illinois Municipal Gas Agency; Natural Gas Pipeline Company of America and Kinder Morgan Interstate Gas Transmission, LLC; CenterPoint Energy Gas Transmission Company; Northern Natural Gas Company; MidAmerican Energy Company; BP America Production Company and BP Energy Company; American Public Gas Association; Williston Basin Interstate Pipeline Company; ANR Pipeline Company and Tennessee Gas Pipeline Company; American Gas Association; and Interstate Natural Gas Association of America.

[2] *Natural Gas Pipeline Negotiated Rates Policies and Practices*, 104 FERC ¶ 61,134 (2003)(July 2003 Order).

[3] The Commission's negotiated rate policies were originally established in Alternatives to Traditional Cost-of-Service Ratemaking for Natural Gas Pipelines, Regulation of Negotiated Transportation Services, 74 FERC ¶ 61,076, order on clarification, 74 FERC ¶ 61,194, order on reh'g, 75 FERC ¶ 61,024 (1996).

[4] Alternatives to Traditional Cost-of-Service Ratemaking for Natural Gas Pipelines, 74 FERC ¶

In order to implement a negotiated rate transaction, a pipeline must file either the negotiated rate agreement itself or a tariff sheet describing the agreement, since, unlike a discount, a negotiated rate is a material deviation from the pipeline's tariff.[5] Until the issuance of the modification of the policy statement, the Commission permitted pipelines to use price indices in pricing their negotiated rate transactions.[6] However, on July 9, 2003, the Commission issued a policy statement, revising its negotiated rate policies so that the use of gas basis differentials would no longer be permitted.[7]

3. In its modification of the original negotiated rate policy statement, the Commission stated that it was concerned that the use of basis differentials could provide pipelines with an incentive to withhold capacity in an attempt to manipulate the gas commodity market to widen the differences between the relevant price indices. The Commission explained that the manner in which it regulated transportation rates would ordinarily minimize any incentive for a pipeline to withhold capacity. That was because even if a pipeline created scarcity, it could not charge rates above the maximum just and reasonable rate based upon the pipeline's cost of service. Therefore, if a pipeline withheld capacity, its revenues would not increase.[8] However, because the negotiated rate policy permits a pipeline to charge a rate above the maximum cost of service rate, a pipeline charging negotiated rates tied to basis differentials could increase its revenues by withholding capacity in order to increase the relevant basis differentials.[9] The Commission concluded that pricing mechanisms that invest pipelines with an incentive to use market power to manipulate the commodity price of gas would hinder the Commission's attempt to maintain and improve the competitive natural gas market. Therefore, the Commission prohibited the use of natural gas indices in pricing negotiated rate transactions.[10]

4. In reaching this determination, the Commission recognized that these basis differential pricing mechanisms are useful in permitting parties to the negotiated agreement to engage in various hedging programs and gas supply cost-management programs, but the Commission found that such flexibility could not justify the increased risk of market manipulation faced by market participants. The Commission determined that this limitation of flexibility was offset by the fact that negotiated rates may still be based upon a virtually unlimited number of indices or other mechanisms that have no relationship with the commodity price of gas, and are, therefore, not as subject to manipulation through the withholding of pipeline capacity.

5. Subsequent to its modification of the negotiated rate policy statement, the Commission modified its selective discounting policies which had prohibited the use of formulas in discounted rates. On remand from the court in *Northern Natural Gas Company,* the Commission determined that it would permit the use of formulas, including those tied to basis differentials in discounted rate transactions.[11] In reaching this determination, the Commission stated that its concerns about the use of basis differentials in negotiated rates were not present to the same degree in the context of discounted rates. The Commission reasoned that because discounted rates, unlike negotiated rates, were capped by the pipeline's maximum cost-of-service rate, use of pricing differentials in discounted rates did not present the pipeline with an incentive to withhold capacity in order to achieve higher revenues. Given this fact, the Commission found that the benefits of allowing the use of basis differentials to price transportation service in discounted rate agreements outweighed any potential harm.

Discussion

6. A number of parties have filed requests for rehearing of the revised policy statement, objecting not only to the revised policy concerning the use of pricing differentials in negotiated rates but also to other aspects of the revised policy statement. The revised policy statement is not a final action of the Commission but an expression of policy intent. As the U.S. Court of Appeals for the District of Columbia Circuit has held, a statement of policy ''is not finally determinative of the issues or rights to which it is addressed''; rather, it only ''announces the agency's tentative intentions for the future.'' [12] Therefore, the parties are not aggrieved by the revised policy statement, and rehearing does not lie.[13] The Commission accordingly dismisses the requests for rehearing.

7. Nevertheless, the Commission has further considered the basis differential issue, and has determined to modify its negotiated rate policy to again permit the use of gas commodity basis differentials in negotiated rate transactions without regard to the existence of a revenue cap. The Commission finds that a generic policy against the use of gas basis differentials in negotiated rate transactions is overly restrictive, given the benefits such pricing mechanisms yield and the fact that there are other less restrictive means to ensure that the pipelines do not utilize market power to influence the gas commodity market.

8. The Commission has long recognized that the ''commodity and transportation markets are closely interdependent in the natural gas business with changes in one market affecting the other.'' [14] Further, the Commission itself has stated that the market conditions it has fostered create a ''market-driven value for transportation * * * the implicit value of transportation between two such points is the spot price of gas at the delivery point minus the spot price of gas at the receipt point.'' [15] Thus, the

61,076 at 61,238–242, order on clarification, 74 FERC ¶ 61,194, order on reh'g, 75 FERC ¶ 61,024 (1996).

[5] NorAm Gas Transmission Co., 75 FERC ¶ 61,091 at 61,309, order on reh'g, 77 FERC ¶ 61,011 at 61,037 (1996).

[6] Before the modification of the Commission's negotiated rate policies, pipelines were permitted to negotiate pricing mechanisms for transportation based upon the difference between gas commodity price indices at different points (referred to here as the ''basis differential''). These gas commodity price indices, when used as a negotiated pricing mechanism, usually reflect gas prices at different points such as at gas basins or certain receipt and delivery points and citygates. The pricing mechanism is based upon the difference between the gas price indices at the two points. The foundation for this pricing mechanism is that the difference in price between two points, as shown by the respective price indices, reflects the value of transportation between the two points.

[7] In its July 9, 2003 Order, the Commission also clarified its filing requirements for negotiated rates, particularly where the negotiated agreement contained material deviations from the form of service agreement. July 2003 Order, 104 FERC at P 31–34.

[8] *Id.* at P 17–18.

[9] *Id.* at P 19–20.

[10] *Id.* at P 23–24.

[11] *Northern Natural Gas Co.,* 105 FERC ¶ 61,299 (2003).

[12] *Pacific Gas & Electric Co.* v. *FPC*, 506 F.2d 33, 38 (D.C. Cir. 1974).

[13] *See Alternatives to Traditional Cost-of-Service Ratemaking for Natural Gas Pipelines*, 75 FERC ¶ 61,024 at 61,076, *citing, American Gas Association* v. *FERC*, 888 F.2d 136 (1989); *Interstate Natural Gas Pipeline Rate Design*, 47 FERC ¶ 61,295 (1985), *order on reh'g*, 48 FERC ¶ 61,122 at 61,442 (1989).

[14] Order No. 637 at 31,258.

[15] *Id.* at 33,436. In this vein, the Commission also added that, ''The implicit price for transportation represents the most any shipper purchasing delivered gas at a downstream market would pay to move gas from the lower priced market to the higher priced market. For instance, the implicit value of transportation between the Henry Hub and

Continued

use of basis differentials to price transportation services enables the pipeline to negotiate market sensitive transportation rates, consistent with the Commission's goal of encouraging competition in the transportation capacity market. Such market sensitive rates provide greater efficiency in the production and distribution of gas across the pipeline grid. For example, such rates minimize the distorting effect of transportation costs on producer decisions concerning exploration and production. They also help the pipeline to more accurately assess when new construction is needed, because a high basis differential indicates a need for more capacity between the points.[16]

9. In implementing its policy against the use of gas basis differentials, the Commission recognized that the use of basis differential pricing mechanisms yielded significant benefits, but stated that such increased flexibility could not justify the increased risk that the pipelines may utilize their market power over transportation service to manipulate the commodity market to increase basis differentials.[17]

10. However, in the Commission's view, the ability of pipelines to manipulate the gas commodity market is tempered by several factors. First, part 284 of the Commission's regulations and its policies provide that pipelines must sell capacity to maximum rate bidders.[18] Therefore, pipelines may not hoard desired capacity in an attempt to widen basis differential without violating the Commission's existing regulations. Second, pipelines must file all negotiated rate agreements with the Commission for approval. Those filing negotiated rate contracts are noticed for comments giving all interested parties an opportunity to raise whatever concerns they have with the agreement. Moreover, the Commission has access to information regarding available pipeline capacity and daily gas basis differentials. This allows it to monitor the transactions to determine if the pipeline is withholding capacity in order to increase the gas commodity basis differential. Moreover, subsequent to the modification of the negotiated rate policy statement, Congress enacted new legislation designed to prohibit manipulation of the gas transportation markets. Concurrently with the issuance of this order, the Commission is approving a final rule in Docket No. RM06–3–000 implementing new section 4A of the Natural Gas Act.[19]

11. Given these facts and the benefits of the use of basis differential pricing mechanisms, the Commission finds that it is not necessary to ban the use of such mechanisms in order to mitigate the potential for manipulation of the market for either transportation or gas sales. Rather, the Commission will permit the use of gas commodity basis differentials and will continue to investigate, on a case by case basis, allegations of market manipulation or attempted market manipulation by pipelines. In this manner, the flexibility benefits of this pricing mechanism may be retained while the Commission maintains the integrity of the marketplace.

The Commission orders:

(A) The requests for rehearing of the Commission's July 9, 2003 Order are dismissed as discussed in the body of this order.

(B) The Commission's July 9, 2003 Order is clarified as discussed in the body of this order.

By the Commission.

Magalie R. Salas,

Secretary.

[FR Doc. E6–941 Filed 1–25–06; 8:45 am]

BILLING CODE 6717–01–P

the Chicago city gate was $.07 in September 1999 (the difference between the $2.67 price for gas in Chicago and the $2.60 price at Henry Hub).'' *Id.* at 31,271. The difference between the downstream delivered gas price and the market price at upstream market centers in the production area shows the market value of transportation service between those two points. As the Commission observed in Order No. 637, ''gas commodity markets now determine the economic value of pipeline transportation services in many parts of the country. Thus, even as FERC has sought to isolate pipeline services from commodity sales, it is within the commodity markets that one can see revealed the true price for gas transportation.'' Order No. 637 at 31,274 (*quoting* M. Barcella, *How Commodity Markets Drive Gas Pipeline Values,* Public Utilities Fortnightly, February 1, 1998 at 24–25).

[16] *See Policy for Selective Discounting by Natural Gas Pipelines,* 111 FERC ¶ 61,309 at P 32–37 (2005).

[17] July 2003 Order, 104 FERC at P 23.

[18] *See Tennessee Gas Pipeline Co.*, 91 FERC ¶ 61,053 (2000), *order on reh'g,* 94 FERC ¶ 61,097 (2001), *aff'd, Process Gas Consumers Group* v. *FERC,* 292 F.3d 831 (D.C. Cir. 2002). Moreover, in Order No. 637–A, the Commission reaffirmed its position that the recourse rate effectively mitigates pipeline market power by stating that ''[T]he requirement that a pipeline sell its capacity at the regulated maximum rate prevents tacit collusion between the pipeline and the shipper to withhold capacity to raise price above the ceiling * * *'' *Id.* at 31,564.

[19] Section 315 of the Energy Policy Act of 2005 added the following provision to the Natural Gas Act:

Prohibition on Market Manipulation

SEC. 4A. It shall be unlawful for any entity, directly or indirectly, to use or employ, in connection with the purchase or sale of natural gas or the purchase or sale of transportation services subject to the jurisdiction of the Commission, any manipulative or deceptive device or contrivance (as those terms are used in section 10(b) of the Securities Exchange Act of 1934 (15 U.S.C. 78j(b))) in contravention of such rules and regulations as the Commission may prescribe as necessary in the public interest or for the protection of natural gas ratepayers. Nothing in this section shall be construed to create a private right of action.

Energy Policy Act of 2005, Pub. L. No. 109–58, § 315, 119 Stat. 594, (2005).

ENVIRONMENTAL PROTECTION AGENCY

[FRL–8025–3]

Proposed CERCLA Administrative Settlement Agreement for the Bountiful/Woods Cross/5th South Pce Plume NPL Site, in Woods Cross, Davis County, UT

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice and request for public comment.

SUMMARY: In accordance with the requirements of section 122(h)(1) of the Comprehensive Environmental Response, Compensation, and Liability Act, as amended (''CERCLA''), 42 U.S.C. 9622(h)(1), notice is hereby given of the proposed administrative settlement under section 122(h) of CERCLA, 42 U.S.C. 9622(h), between EPA and W.S. Hatch Company and Jack B. Kelley, Inc. (''Settling Parties'') regarding the W.S. Hatch facility (the ''Facility''). The property which is the subject of this proposed Settlement Agreement is a parcel of land approximately three acres in size and is located at approximately 643 South and 800 West in Woods Cross, Davis County, Utah. The terms of the proposed Administrative Settlement Agreement, (the ''Settlement''), are intended to resolve the Settling Parties' liability at the Site for all response costs incurred and paid, or to be incurred and paid, by EPA in connection with the work performed at the Site as provided for in the Settlement.

W.S. Hatch Company, a subsidiary of Jack B. Kelley, Inc., is the owner of a parcel of land which has been impacted by business operations at the Facility and is included within the defined boundaries of the Site. The proposed Settlement will resolve the Settling Parties' liability under section 107(a)(1) of CERCLA, 42 U.S.C. 9607(a)(1). EPA has performed an ability to pay analysis of Settling Parties' financial capacity. Under the terms of the proposed Settlement, W.S. Hatch Company agrees to pay $450,000, plus interest, to EPA over five installment payments, and Jack B. Kelley, Inc. agrees to pay the principal sum of $40,000 to EPA. In exchange, the Settling Parties will settle their liability for all response costs incurred and paid, or to be incurred and

paid, at the Site in connection with the work performed at the Site as provided for in the Settlement.

Opportunity for Comment: For thirty (30) days following the date of publication of this notice, the Agency will consider all comments received on the Payment of Response Costs portion of the Settlement only (Section VI) and may modify or withdraw its consent to the Settlement if comments received disclose facts or considerations which indicate that the settlement is inappropriate, improper, or inadequate. The Agency's response to any comments received will be available for public inspection at the EPA Superfund Record Center, 999 18th Street, 5th Floor, in Denver, Colorado.

DATES: Comments must be submitted on or before February 27, 2006.

ADDRESSES: The proposed settlement and additional background information relating to the settlement are available for public inspection at the EPA Superfund Records Center, 999 18th Street, 5th Floor, in Denver, Colorado. Comments and requests for a copy of the proposed settlement should be addressed to Carol Pokorny, Enforcement Specialist (8ENF–RC), Technical Enforcement Program, U.S. Environmental Protection Agency, 999 18th Street, Suite 300, Denver, Colorado 80202–2466, and should reference the Hatch Co/Kelley Settlement Agreement for the Bountiful/Woods Cross/5th South PCE Plume NPL Site in Bountiful, Davis County, Utah.

FOR FURTHER INFORMATION CONTACT: Carol Pokorny, Enforcement Specialist (8ENF–RC), Technical Enforcement Program, U.S. Environmental Protection Agency, 999 18th Street, Suite 300, Denver, Colorado 80202–2466, (303) 312–6970.

It is so agreed.

Dated: January 13, 2006.

Carol Rushin,

Assistant Regional Administrator, Office of Enforcement, Compliance and Environmental Justice, Region VIII.

[FR Doc. E6–993 Filed 1–25–06; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The application also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act (12 U.S.C. 1843). Unless otherwise noted, nonbanking activities will be conducted throughout the United States. Additional information on all bank holding companies may be obtained from the National Information Center website at *http://www.ffiec.gov/nic/*.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than February 21, 2006.

A. Federal Reserve Bank of Chicago (Patrick M. Wilder, Assistant Vice President) 230 South LaSalle Street, Chicago, Illinois 60690-1414:

1. Marshall &Ilsley Corporation, Milwaukee, Wisconsin; to acquire 100 percent of the voting shares of Trustcorp Financial, Inc., St. Louis, Missouri, and thereby indirectly acquire Missouri State Bank and Trust Company, Clayton, Missouri.

B. Federal Reserve Bank of San Francisco (Tracy Basinger, Director, Regional and Community Bank Group) 101 Market Street, San Francisco, California 94105-1579:

1. Wells Fargo & Company, San Francisco, California; to acquire 100 percent voting shares of Fremont National Bank of Canon City, Canon City, Colorado.

2. Wells Fargo &Company, San Francisco, California; to acquire 100 percent voting shares of Centennial Bank of Pueblo, Pueblo, Colorado.

Board of Governors of the Federal Reserve System, January 20, 2006.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. E6–932 Filed 1–25–06; 8:45 am]

BILLING CODE 6210–01–S

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR Part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The application also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act (12 U.S.C. 1843). Unless otherwise noted, nonbanking activities will be conducted throughout the United States. Additional information on all bank holding companies may be obtained from the National Information Center website at *www.ffiec.gov/nic/*.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than February, 21, 2006.

A. Federal Reserve Bank of Kansas City (Donna J. Ward, Assistant Vice President) 925 Grand Avenue, Kansas City, Missouri 64198-0001:

1. Citizens Bancshares, Inc. ESOP, Edmond, Oklahoma; to acquire up to 40 percent of the voting shares of Citizens Bancshares, Inc., Edmond, Oklahoma, and thereby indirectly acquire voting shares of The Citizens Bank of Edmond, Edmond, Oklahoma.

Board of Governors of the Federal Reserve System, January 23, 2006.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. E6–956 Filed 1–25–06; 8:45 am]

BILLING CODE 6210–01–S

FEDERAL RESERVE SYSTEM

Notice of Proposals to Engage in Permissible Nonbanking Activities or to Acquire Companies that are Engaged in Permissible Nonbanking Activities

The companies listed in this notice have given notice under section 4 of the Bank Holding Company Act (12 U.S.C. 1843) (BHC Act) and Regulation Y (12 CFR Part 225) to engage *de novo*, or to acquire or control voting securities or assets of a company, including the companies listed below, that engages either directly or through a subsidiary or other company, in a nonbanking activity that is listed in § 225.28 of Regulation Y (12 CFR 225.28) or that the Board has determined by Order to be closely related to banking and permissible for bank holding companies. Unless otherwise noted, these activities will be conducted throughout the United States.

Each notice is available for inspection at the Federal Reserve Bank indicated. The notice also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the question whether the proposal complies with the standards of section 4 of the BHC Act. Additional information on all bank holding companies may be obtained from the National Information Center website at *www.ffiec.gov/nic/*.

Unless otherwise noted, comments regarding the applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than February 21, 2006.

A. Federal Reserve Bank of Chicago (Patrick M. Wilder, Assistant Vice President) 230 South LaSalle Street, Chicago, Illinois 60690-1414:

1. Marquette National Corporation, Chicago, Illinois; to acquire 100 percent of the voting shares of Hemlock Federal Financial Corporation, Oak Forest, Illinois, and thereby indirectly acquire Hemlock Federal Bank for Savings, Oak Forest, Illinois, and thereby engage in operating a savings association, pursuant to section 225.28(b)(4)(ii) of Regulation Y.

Board of Governors of the Federal Reserve System, January 23, 2006.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. E6–957 Filed 1–25–06; 8:45 am]

BILLING CODE 6210–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

Notice of Interest Rate on Overdue Debts

Section 30.13 of the Department of Health and Human Services' claims collection regulations (45 CFR part 30) provides that the Secretary shall charge an annual rate of interest as fixed by the Secretary of the Treasury after taking into consideration private consumer rates of interest prevailing on the date that HHS becomes entitled to recovery. The rate generally cannot be lower than the Department of Treasury's current value of funds rate or the applicable rate determined from the ''Schedule of Certified Interest Rates with Range of Maturities.'' This rate may be revised quarterly by the Secretary of the Treasury and shall be published quarterly by the Department of Health and Human Services in the **Federal Register**.

The Secretary of the Treasury has certified a rate of 11⅞% for the quarter ended December 31, 2005. This interest rate will remain in effect until such time as the Secretary of the Treasury notifies HHS of any change.

Dated: January 19, 2006.

Sheila Conley,

Deputy Assistant Secretary, Finance.

[FR Doc. 06–727 Filed 1–25–06; 8:45 am]

BILLING CODE 4150–04–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Program Support Center

Use of Federal Real Property To Assist the Homeless

AGENCY: Program Support Center, HHS.

ACTION: Notice of proposed policy change; request for comments.

SUMMARY: Title V of the McKinney-Vento Homeless Assistance Act, 42 U.S.C. 11411 (Title V) authorizes the Secretary of Health and Human Services (the Secretary) to make suitable Federal properties categorized as excess or surplus available to representatives of persons experiencing homelessness as a permissible use in the protection of public health. The Department of Health and Human Services (HHS) is requesting comment on its proposal to revise its current policy under Title V to include permanent supportive housing as an allowable use of surplus real property to assist persons experiencing homelessness. The purpose of this proposed change is to increase the housing and service opportunities available to communities as they respond to homelessness, and is consistent with efforts within the Federal, state, and local governments, and communities themselves, to end chronic homelessness.

DATES: Submit comments on or before February 27, 2006.

ADDRESSES: Send comments to John G. Hicks, Chief, Space Management Branch, Division of Property Management, Administration Operations Service, Program Support Center, Room 5B–41, Parklawn Building, 5600 Fishers Lane, Rockville, Maryland 20857. Comments may also be submitted electronically, either via the Federal rulemaking public portal *http://www.regulations.gov* or by e-mailing comments to *rpb@psc.gov*.

FOR FURTHER INFORMATION CONTACT: John G. Hicks, Chief, Space Management Branch; Telephone number (301) 443–2001.

SUPPLEMENTARY INFORMATION:

I. Background

The HHS Program Support Center (PSC) administers the Federal Real Property Assistance Program, the program that governs the transfer of surplus Federal real property for public health purposes under Title 40, section 550 of the United States Code, ''Public Buildings, Property, and Works,'' and the transfer of excess and surplus Federal Real Property pursuant to Title V.

Under Title V of the McKinney Act, a representative of persons experiencing homelessness may submit an application to the Secretary of HHS to acquire suitable excess or surplus Federal real property for use in the assistance of persons experiencing homelessness. In 1991, HHS, the Department of Housing and Urban Development (HUD), and the General Services Administration (GSA) jointly published a regulation implementing the provisions of Title V, codified at 45 CFR part 12a (the joint regulation). Title V authorizes the Secretary to make property in these categories available to representatives of persons experiencing homelessness, by lease or deed, as a public health use pursuant to subsections (a) to (d) of section 550 of Title 40, United States Code. In accordance with subsection (d) of Title 40, the Secretary may propose to sell or lease property assigned to the Secretary for use in the protection of the public health, including research. To implement both Title V and section 550 of Title 40, the Secretary determines

whether an applicant's proposed program of utilization is an approvable public health program, and then recommends to the Administrator which excess and surplus real property is needed for that approved program in the protection of the public health. 40 U.S.C. 550(d); 45 CFR 12.3(a).

Title V of the McKinney Act, which was enacted in 1987, directs HHS to include, as a permissible use in the protection of public health, the furnishing of surplus real property to assist homeless individuals and families. Title V does not prescribe appropriate homeless assistance programs.

HHS concluded in 1992 that long-term housing did not constitute an appropriate public health use of surplus real property under Title V. HHS subsequently adopted the Department of Housing and Urban Development's (HUD) standard, limiting occupancy in Title V's transitional housing programs to 24 months. Until now, HHS has not considered whether the provision of long-term, community-based housing linked with supportive services for persons experiencing homelessness was a permissible public health use.

The Secretary exercises the authority to approve permanent supportive housing programs for Title V, consistent with HHS' mission to protect the public health. There are several critical distinctions between the policy decision in 1992 regarding the use of surplus real property for low-income housing and the current proposal to allow surplus real property to be used for permanent supportive housing. Low-income housing is defined as subsidized housing opportunities for individuals with low incomes. The provision of low-income housing (i.e. the Section 8 Housing Choice Voucher Program) is under the purview of HUD. HHS, as the nation's public health agency, does not operate low-income housing programs, and does not possess the experience or expertise to complement HUD's mission. The proposed policy revision is intended to reaffirm HHS' 1992 determination that the provision of low-income housing does not constitute an appropriate public health use of surplus real property under Title V. In contrast, we are proposing a permanent supportive housing program that is long-term, community-based, and linked to supportive services for homeless persons with disabilities.

II. Proposed Policy Revision

HHS has historically been involved in the provision of permanent supportive housing, such as through the Projects for Assistance in Transition from Homelessness (PATH) program that is operated in SAMHSA. Given HHS' history of involvement in the health service component of supportive housing programs, there is precedent to suggest that this would be an appropriate public health use of surplus real property under Title V.

Permanent supportive housing is a service model that links housing and services together, without the 24-month time limit traditionally imposed by a transitional housing program. Initial research thus far suggests the effectiveness of permanent supportive housing for individuals with disabilities and those who are chronically homeless. In several studies, this model has been successful at achieving housing stability. For example, placement of homeless people with severe mental illness in permanent supportive housing is associated with reductions in subsequent use of shelters, hospitalizations, and incarcerations (Culhane et al., 2001). Early outcomes in a study of supportive housing with integrated services suggest that these services reduced the use of emergency health care rooms, psychiatric and detoxification programs as well as inpatient care (Corporation for Supportive Housing, 2000). Experimental studies comparing the relative impact of case management and housing resources suggest that long-term housing resources are distinctively effective in reducing homelessness (Rosenheck, 2003).

The proposed policy revision would allow property acquired through the Title V process to be utilized for the development of permanent supportive housing programs that provide permanent housing along with supportive services to homeless people in need of public health assistance and/or services (*e.g.*, substance abuse, mental health, case management, and disabled and frail elderly homeless services). This change would not preclude communities from using surplus property to develop transitional housing programs, emergency shelter programs, or any other homeless assistance program currently approvable by HHS, but simply expands the options available under Title V.

For the purpose of the Title V program, permanent supportive housing means programs that provide long-term, community-based housing that is linked to appropriate supportive health and social services (*e.g.*, substance abuse, mental health, case management, and disabled and frail elderly services) that enable homeless individuals and homeless families with disabilities to maintain housing. Eligible populations for this program include homeless individuals with disabilities, homeless families with a disabled family member (either parent or child), and homeless frail elderly populations.

The same evaluation criteria outlined in the joint regulation will continue to apply to all applications received for consideration under Title V, including those requesting property to be used for permanent supportive housing. Applicants must fully describe the proposed program, demonstrate how the services to be provided will address the needs of the homeless population to be served, and otherwise comply with the requirements of Title V and the joint agency regulation.

We invite public comment on all aspects of the proposed policy change, particularly on the proposed definition of permanent supportive housing.

Dated: December 19, 2005.

J. Philip VanLandingham,

Deputy Assistant Secretary for Program Support.

[FR Doc. E6–1016 Filed 1–25–06; 8:45 am]

BILLING CODE 4150–03–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Substance Abuse and Mental Health Services Administration

Agency Information Collection Activities: Proposed Collection; Comment Request

In compliance with section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 concerning opportunity for public comment on proposed collections of information, the Substance Abuse and Mental Health Services Administration (SAMHSA) will publish periodic summaries of proposed projects. To request more information on the proposed projects or to obtain a copy of the information collection plans, call the SAMHSA Reports Clearance Officer on (240) 276–1243.

Comments are invited on: (a) Whether the proposed collections of information are necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use

of automated collection techniques or other forms of information technology.

Proposed Project: National Evaluation of the Protection and Advocacy for Individuals with Mental Illness (PAIMI) Program—NEW

In recognition that systematic evaluation of this and other government programs are an expected practice under both the Government Performance and Results Act (GPRA) and the Office of Management and Budget's Program Assessment and Rating Tool (PART), the Substance Abuse and Mental Health Services Administration's Center for Mental Health Services (CMHS) will conduct an independent evaluation of the PAIMI Program. CMHS will employ information that is routinely collected under existing program requirements and is also expected to collect new, additional data that are also necessary for the conduct of the evaluation. [On January 1, each eligible State protection and advocacy (P&A) system is required to transmit to the Secretary and head of the State Mental Health Agency, in which the system is located, a report describing its activities, accomplishments, and expenditures during the most recently completed fiscal year. None of the data collection activities described above will be redundant with these existing reporting requirements.] The evaluation plan includes gathering information about the PAIMI program from persons with different perspectives. Accordingly, CMHS proposes to proceed with the following new data collection activities:

(1) Survey interviews with the Executive Directors of each of the Protection and Advocacy Grantees, as well as other staff whom they may ask to join them in these interviews to include:

a. Characteristics and shared functions between the P&A Governing Board and the PAIMI Advisory Council

b. Processes to establish PAIMI goals and priorities

c. Federal support of the PAIMI program

d. Federal oversight of the PAIMI program

e. Organization and staffing of PAIMI responsibilities within the P&A

f. Procedures for quality management

g. Background of respondent

(2) Surveys of and focus groups with persons who receive services from PAIMI programs to include:

a. Access to PAIMI services

b. Quality of services provided to clients

c. Satisfaction with services

d. Background of respondent

(3) Surveys of the Chairs of the Advisory Councils of each PAIMI Grantee to include:

a. Characteristics and shared functions between the P&A Governing Board and the PAIMI Advisory Council

b. Processes to establish PAIMI goals and priorities and assessment of those priorities

c. Organization and staffing of PAIMI responsibilities within the P&A

d. Quality of services provided to clients

e. Background of respondent

(4) Surveys of the Program Directors of State Mental Health Authorities to include:

a. Types of communication between the State Mental Health Authority and the PAIMI program

b. Processes to establish PAIMI goals and priorities and assessment of those priorities

c. Relationship between the State Mental Health Authority and the PAIMI program

d. Role of the PAIMI program in the mental health advocacy community

e. Background of respondent

(5) Survey of directors of other organizations who are likely to be familiar with or collaborate in PAIMI activities in each State; including family and consumer groups and other mental health advocacy organizations to include:

a. Types of interaction between the State Mental Health Authority and the PAIMI program.

b. Processes to establish PAIMI goals and priorities and assessment of those priorities

c. Relationship between the organization and the PAIMI program

d. Access to and quality of services provided to PAIMI recipients

e. Role of the PAIMI program in the mental health advocacy community

f. Background of respondent

The PAIMI program has never undergone an independent evaluation. The approach being used is to conduct survey interviews with a cross-section of five primary Stakeholder groups connected to the PAIMI program, including Program Directors/staff, Clients/Recipients of services, PAIMI Advisory Council Chairs, Directors of State Mental Health Authorities, and Directors of Other Mental Health Advocacy Organizations in an effort to obtain a representative sample of viewpoints about the PAIMI program. The surveys have been developed to include questions relevant to each of the respective Stakeholder groups named above and range from 22 questions to as many as 88 questions. Depending on the Stakeholder group, respondent surveys are expected to take from thirty minutes up to two hours to complete.

The burden estimate for conducting the surveys under the evaluation plan for the PAIMI Program is as follows:

Surveys	Number of respondents	Responses per respondent	Burden per response (hrs.)	Total burden (hrs.)
P&A Executive Director Survey	57	1	2	114
PAIMI Client Survey	100	1	1.5	150
PAIMI Advisory Council Chair Survey	57	1	1	57
State Mental Health Program Directors Survey	57	1	.5	28.5
Directors of Other Mental Health Advocacy Organizations Survey	171	1	.5	85.5
Totals	442			425

Send comments to Summer King, SAMHSA Reports Clearance Officer, Room 71–1044, One Choke Cherry Road, Rockville, MD 20857. Written comments should be received within 60 days of this notice.

Dated: January 20, 2006.

Anna Marsh,

Executive Officer, SAMHSA.

[FR Doc. E6–964 Filed 1–25–06; 8:45 am]

BILLING CODE 4162–20–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Substance Abuse and Mental Health Services Administration

Agency Information Collection Activities: Proposed Collection; Comment Request

In compliance with section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 concerning opportunity for public comment on proposed collections of information, the Substance Abuse and Mental Health Services Administration will publish periodic summaries of proposed projects. To request more information on the proposed projects or to obtain a copy of the information collection plans, call the SAMHSA Reports Clearance Officer on (240) 276–1243.

Comments are invited on: (a) Whether the proposed collections of information are necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Proposed Project: National Evaluation of the Comprehensive Community Mental Health Services for Children and Their Families Program: Phase V—NEW

The Substance Abuse and Mental Health Services Administration (SAMHSA), Center of Mental Health is responsible for the national evaluation of the Comprehensive Community Mental Health Services for Children and Their Families Program that will collect data on child mental health outcomes, family life, and service system development and performance. Data will be collected on 25 service systems, and roughly 7310 children and families.

The data collection for this evaluation will be conducted over a five-year period. The core of service system data will be collected every 18 to 24 months throughout the 5-year evaluation period, with a sustainability survey conducted in selected years. Service delivery and system variables of interest include the following: maturity of system of care development, adherence to the system of care program model, and client service experience. The length of time that individual families will participate in the study ranges from 18 to 36 months depending on when they enter the evaluation. Child and family outcomes of interest will be collected at intake and during subsequent follow-up interviews at six-month intervals. Client service experience information is collected at these follow-up interviews. Measures included in an outcome interview are determined by the type of assessment (intake or follow up), child's age, and whether the respondent is the caregiver or a youth.

The outcome measures include the following: Child symptomatology and functioning, family functioning, material resources, and caregiver strain. The caregiver interview package includes the Caregiver Information Questionnaire, Child Behavior Checklist, Behavioral and Emotional Rating Scale (BERS), Education Questionnaire, Columbia Impairment Questionnaire, Living Situations Questionnaire, Family Life Questionnaire, and Caregiver Strain Questionnaire (caregivers of children under age 6 complete the Vineland Screener to assess development, and do not complete the BERS) at intake, and also complete the Multi-service Sector Contacts Form, Culturally Competence and Service Provision Questionnaire and the Youth Services Survey (a national outcome measurement tool). The Youth Interview package includes the Youth Information Questionnaire, Revised Children's Manifest Anxiety Scale, Reynolds Depression Scale, BERS (youth version), Delinquency Survey, Substance Use Survey, GAIN-Quick: Substance Dependence Scale, and Youth Services Survey (youth version).

In addition the evaluation will include two special studies: (1) An evidence-based practices study will examine provider use of evidence-based practices, community readiness and implementation of evidence-based practices, and consumer experience with these practices; (2) A cultural and linguistic competence study will examine the extent to which the cultural and linguistic characteristics of communities influence program implementation and provider adaptation of evidence-based treatments, and provider service delivery decisions based on provider culture and language. The national evaluation measures address the national outcome measures for mental health programs as currently established by SAMHSA.

Internet-based technology will be used for data entry and management, and for collecting data using Web-based surveys. The average annual respondent burden with detail provided about burden contributed by specific measures is estimated below. The estimate reflects the average number of respondents in each respondent category, the average number of responses per respondent per year, the average length time it will take for each response, and the total average annual burden for each category of respondent, and for all categories of respondents combined.

ESTIMATE OF RESPONDENT BURDEN

[Note: Total burden is annualized over a 5-year period.]

Instrument	Respondent	Number of respondents	Total average number of responses per respondent	Hours per response	Total burden hours	5 year average annual burden hours
System-of-care Assessment:						
Interview Guides and Data Collection Forms.	Key site informants.	525	3	1.00	1,575	315
Interagency Collaboration Scale (IACS).	Key site informants.	525	3	0.13	210	42
Cross-sectional Descriptive Study:						

ESTIMATE OF RESPONDENT BURDEN—Continued

[Note: Total burden is annualized over a 5-year period.]

Instrument	Respondent	Number of respondents	Total average number of responses per respondent	Hours per response	Total burden hours	5 year average annual burden hours
Caregiver Information Questionnaire (CIQ–IC).	Caregiver	7,310	1	0.283	2,069	414
Caregiver Information Questionnaire Followup (CIQ–FC).	Caregiver	7,310	5	0.200	7,310	1,462
Child and Family Outcome Study:						
Caregiver Strain Questionnaire (CGSQ).	Caregiver	7,310	6	0.167	7,325	1,465
Child Behavior Checklist (CBCL)/Child Behavior Checklist 1½–5 (CBCL 1½–5).	Caregiver	7,310	6	0.333	14,605	2,921
Education Questionnaire (EQ) ..	Caregiver	7,310	6	0.333	14,605	2,921
Living Situations Questionnaire (LSQ).	Caregiver	7,310	6	0.083	3,640	728
The Family Life Questionnaire (FLQ).	Caregiver	7,310	6	0.050	2,193	439
Behavioral and Emotional Rating Scale (BERS).	Caregiver	6,945	6	0.167	6,958	1,392
Columbia Impairment Scale (CIS).	Caregiver	6,945	6	0.083	3,472	694
The Vineland Screener (VS)	Caregiver	283	5	0.250	456	91
Delinquency Survey (DS)	Youth	4,386	6	0.167	4,394	879
Behavioral and Emotional Rating Scale—Second Edition, Youth Rating Scale (BERS–2).	Youth	4,386	6	0.167	4,395	879
Gain-quick Substance Related Issues (Gain SRI).	Youth	4,386	6	0.083	2,184	437
Substance Use Scale (SUS)	Youth	4,386	6	0.100	2,632	526
Revised Children's Manifest Anxiety Scales (RCMAS).	Youth	4,386	6	0.050	1,316	263
Reynolds Adolescent Depression Scale—Second Edition (RADS–2).	Youth	4,386	6	0.050	1,315	263
Youth Information Questionnaire (YIQ–I).	Youth	4,386	1	0.167	732	146
Youth Information Questionnaire (YIQ–F).	Youth	4,386	5	0.167	3,662	732
Service Experience Study:						
Multi-Sector Service Contacts (MSSC).	Caregiver	7,310	5	0.250	9,137	1,828
Evidence-Based Practice Measure (EBPEM).	Caregiver	7,310	5	0.167	6,092	1,218
Cultural Competence and Service Provision Questionnaire (CCSP).	Caregiver	7,310	5	0.167	6,092	1,218
Youth Services Survey—Family (YSS–F).	Caregiver	7,310	5	0.117	4,276	855
Youth Services Survey (YSS) ...	Youth	4,386	5	0.083	1,820	364
Evidence Based Practices Study:						
Evidence Based Treatment Survey (EBT).	Provider	1,125	3	0.333	1,124	224
Evidence-Based Provider Attitudes Survey (EBPAS).	Provider	1,125	3	0.083	280	56
Organizational Readiness for Change Scale (ORC–S).	Provider	1,125	3	0.417	1,407	281
Organizational Readiness for Change Scale (ORC–D).	Administrators/ Managers.	75	3	0.417	94	19
Sustainability Study:						
Sustainability Survey—Caregiver.	Caregiver	25	3	0.500	38	8
Sustainability Survey—Provider	Provider/Administrator.	75	3	0.500	112	23

	Number of distinct respondents	Number of response per respondent	Average burden per response (hours)	Total average annual burden (hours)
Summary of Annualized Burden Estimates for 5 Years				
Caregivers	7,310	1	2.31	17,654
Youth	4,386	1	0.71	3,247
Provider/Administrators	1,725	1	0.93	961
Total Summary	13,421	133	.....	109,308
Total Annual Average Summary	2,684	27	.....	21,861

Send comments to Summer King, SAMHSA Reports Clearance Officer, Room 71–1044, One Choke Cherry Road, Rockville, MD 20857. Written comments should be received within 60 days of this notice.

Dated: January 20, 2006.

Anna Marsh,

Director, Office of Program Services.

[FR Doc. E6–965 Filed 1–25–06; 8:45 am]

BILLING CODE 4162–20–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[USCG–2006–23670]

Chemical Transportation Advisory Committee

AGENCY: Coast Guard, DHS.

ACTION: Notice of meeting.

SUMMARY: The Chemical Transportation Advisory Committee (CTAC) Subcommittees on Outreach and Hazardous Cargo Transportation Security (HCTS) will meet to discuss various issues relating to CTAC and the marine transportation of hazardous materials in bulk. The CTAC Working Groups on Barge Emissions and the International Convention for the Prevention of Pollution from Ships, 1973 (MARPOL) Annex II will also meet to discuss environmental issues and future changes to regulations. These meetings will be open to the public.

DATES: The Barge Emissions Working Group will meet on Tuesday, February 7, 2006, from 8:30 a.m. to 2 p.m. The Outreach Subcommittee will meet on Tuesday, February 7, 2006, from 2 p.m. to 4 p.m. The MARPOL Annex II Working Group will meet on Wednesday, February 8, 2006, from 8:30 a.m. to 4 p.m. The HCTS Subcommittee will meet on Thursday, February 9, 2006, from 8:30 a.m. to 4 p.m. These meetings may close early if all business is finished. Written material and requests to make oral presentations should reach the Coast Guard on or before February 2, 2006. Requests to have a copy of your material distributed to each member of the Committee should reach the Coast Guard on or before February 2, 2006.

ADDRESSES: All meetings will be held at American Commercial Barge Lines LLC, 1701 E. Market Street, Jeffersonville, IN 47131. Send written material and requests to make oral presentations to Commander Robert J. Hennessy, Executive Director of CTAC, Commandant (G–PSO–3), U.S. Coast Guard Headquarters, 2100 Second Street, SW., Washington, DC 20593–0001 or E-mail: *CTAC@comdt.uscg.mil*. This notice is available on the Internet at *http://dms.dot.gov*.

FOR FURTHER INFORMATION CONTACT: Commander Robert J. Hennessy, Executive Director of CTAC, or Ms. Sara Ju, Assistant to the Executive Director, telephone 202–267–1217, fax 202–267–4570.

SUPPLEMENTARY INFORMATION: Notice of these meetings is given under the Federal Advisory Committee Act, 5 U.S.C. App. 2.

Agenda of Barge Emissions Working Group Meeting on Tuesday, February 7, 2006

(1) Introduce Working Group members and attendees.

(2) Review best practices and develop implementation strategy to reduce barge emissions.

Agenda of Outreach Subcommittee Meeting on Tuesday, February 7, 2006

(1) Introduce Subcommittee members and attendees.

(2) Review and edit CTAC accomplishments list.

(3) Develop outline for future CTAC presentation.

Agenda of the MARPOL Annex II Working Group Wednesday, February 8, 2006

(1) Introduce Working Group members and attendees.

(2) Review and edit draft Coast Guard Navigation and Vessel Inspection Circular for the U.S. implementation of revisions to MARPOL Annex II and the International Code for the Construction and Equipment of Ships Carrying Dangerous Chemicals in Bulk (IBC Code).

Agenda of HCTS Subcommittee Meeting on Thursday, February 9, 2006

(1) Introduce Subcommittee members and attendees.

(2) Discuss proposed changes to the Certain Dangerous Cargo and Advanced Notice of Arrival regulations.

(3) Discuss prioritized work list for the Subcommittee.

(4) Discuss the future of the Subcommittee.

Procedural

These meetings are open to the public. Please note that the meetings may close early if all business is finished. At the discretion of the Chair, members of the public may make oral presentations during the meetings generally limited to 5 minutes. If you would like to make an oral presentation at a meeting, please notify the Executive Director and submit written material on or before February 2, 2006. If you would like a copy of your material distributed to each member of the Committee in advance of a meeting, please submit 25 copies to the Executive Director (see **ADDRESSES**) no later than February 2, 2006.

Information on Services for Individuals with Disabilities

For information on facilities or services for individuals with disabilities, or to request special assistance at the meeting, telephone the Executive Director as soon as possible.

Dated: January 20, 2006.

R.J. Petow,

Acting Director of Prevention Standards.

[FR Doc. E6–960 Filed 1–25–06; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

Agency Information Collection Activities: Extension of a Currently Approved Information Collection; Comment Request

ACTION: 30-Day notice of information collection under review; Biographic Information, Form G–325, 1615–0008.

The Department of Homeland Security, U.S. Citizenship and Immigration Services (USCIS) has submitted the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995. The information collection was previously published in the **Federal Register** on October 21, 2005, at 70 FR 61295. The notice allowed for a 60-day public comment period. No comments were received on this information collection.

A second notice allowing for a 60-day comment period was erroneously published on January 23, 2006, at 71 FR 3523. The January 23, 2006 notice should have allowed an additional 30 days for public comments rather than 60 days for public comments.

The purpose of this notice is to correct the information in the January 23, 2006 notice and to allow for an additional 30 days for public comments. Comments are encouraged and will be accepted until February 27, 2006. This process is conducted in accordance with 5 CFR 1320.10.

Written comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time, should be directed to the Department of Homeland Security (DHS), USCIS, Director, Regulatory Management Division, Clearance Office, 111 Massachusetts Avenue, 3rd floor, Washington, DC 20529. Comments may also be submitted to DHS via facsimile to 202–272–8352 or via e-mail at *rfs.regs.@dhs.gov.* When submitting comments by e-mail please make sure to add OMB Control Number 1615–0051 in the subject box. Written comments and suggestions from the public and affected agencies should address one or more of the following four points:

(1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agencies estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Overview of this information collection:

(1) *Type of Information Collection: Extension of currently approved collection.*

(2) *Title of the Form/Collection:* Biographic Information.

(3) *Agency form number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:* Form G–325, 1615–0008. U.S. Citizenship and Immigration Services.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Individuals and Households. This form is used to check other agency records on application or petitions submitted for benefits under the Immigration and Nationality Act. Additionally, this form is required for applicants for adjustment to permanent resident status and specific applicants for naturalization.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 1,144,994 responses at 15 minutes (.25 hours) per response.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 286,249 annual burden hours.

If you have additional comments, suggestions, or need a copy of the proposed information collection instrument with instructions, or additional information, please visit the USCIS Web site at: *http://uscis.gov/graphics/formsfee/forms/pra/index.htm.*

If additional information is required contact: USCIS, Regulatory Management Division, 111 Massachusetts Avenue, 3rd Floor, Washington, DC 20529, (202) 272–8377.

Dated: January 23, 2006.

Richard A. Sloan,

Director, Regulatory Management Division, U.S. Citizenship and Immigration Services.

[FR Doc. 06–755 Filed 1–25–06; 8:45 am]

BILLING CODE 4410–10–M

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5037–N–04]

Notice of Submission of Proposed Information Collection to OMB; Customer Service and Satisfaction Survey of Public Housing Residents

AGENCY: Office of the Chief Information Officer, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below has been submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

Information collected measures residents' level of satisfaction with their living conditions, facilitates interaction and communication between PHAs/owners and residents, and guides managers in recognizing areas of concern identified by residents.

DATES: *Comments Due Date:* February 27, 2006.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB approval Number (2507–0001) and should be sent to: HUD Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503; fax: 202–395–6974.

FOR FURTHER INFORMATION CONTACT: Lillian Deitzer, Reports Management Officer, AYO, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; e-mail Lillian Deitzer at *Lillian_L_Deitzer@HUD.gov* or telephone (202) 708–2374. This is not a toll-free number.

Copies of available documents submitted to OMB may be obtained from Ms Deitzer.

SUPPLEMENTARY INFORMATION: This notice informs the public that the Department of Housing and Urban Development has submitted to OMB a request for approval of the information collection described below. This notice is soliciting comments from members of the public and affecting agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of

information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses.

This notice also lists the following information:

Title of Proposal: Customer Service and Satisfaction Survey of Public Housing Residents.

OMB Approval Number: 2507–0001.

Form Numbers: None.

Description of the Need for the Information and Its Proposed Use: Information collected measures residents' level of satisfaction with their living conditions, facilitates interaction and communication between PHAs/owners and residents, and guides managers in recognizing areas of concern identified by residents.

Frequency of Submission: Annually.

	Number of respondents	Annual responses	×	Hours per response	×	Burden hours
Reporting Burden	482,928	0.34		0.31		51,466

Total Estimated Burden Hours: 51,466.

Status: Extension of a currently approved collection.

Authority: Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. 35, as amended.

Dated: January 20, 2006.

Lillian L. Deitzer,

Departmental Paperwork Reduction Act Officer, Office of the Chief Information Officer.

[FR Doc. E6–938 Filed 1–25–06; 8:45 am]

BILLING CODE 4210–72–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Notice of Intent To Prepare a Comprehensive Conservation Plan and Environmental Assessment for Eufaula National Wildlife Refuge in Barbour and Russell Counties, AL, and Stewart and Quitman Counties, GA

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of intent.

SUMMARY: The Fish and Wildlife Service, Southeast Region, intends to gather information necessary to prepare a comprehensive conservation plan and environmental assessment pursuant to the National Environmental Policy Act of 1969 and its implementing regulations.

The National Wildlife Refuge System Administration Act of 1966, as amended by the National Wildlife Refuge System Improvement Act of 1997, requires the Service to develop a comprehensive conservation plan for each national wildlife refuge. The purpose in developing a comprehensive conservation plan is to provide refuge managers with a 15-year strategy for achieving refuge purposes and contributing toward the mission of the National Wildlife Refuge System, consistent with sound principles of fish and wildlife management, conservation, legal mandates, and Service policies. In addition to outlining broad management direction on conserving wildlife and their habitats, plans identify wildlife-dependent recreational opportunities available to the public, including opportunities for hunting, fishing, wildlife observation, wildlife photography, and environmental education and interpretation.

The purpose of this notice is to achieve the following:

(1) Advise other agencies and the public of our intentions, and

(2) Obtain suggestions and information on the scope of issues to include in the environmental document.

DATES: An open house style meeting will be held during the scoping phase and public draft phase of the comprehensive conservation plan development process. Special mailings, newspaper articles, and other media announcements will be used to inform the public and state and local government agencies of the dates and opportunities for input throughout the planning process.

ADDRESSES: Comments and requests for more information regarding the Eufaula National Wildlife Refuge planning process should be sent to: Mike Dawson, Refuge Planner, Fish and Wildlife Service, 6578 Dogwood View Parkway, Suite B, Jackson, Mississippi 39213; Telephone: 601/965–4903, ext. 20; Fax: 601/965–4010; Electronic mail: *mike_dawson@fws.gov*. To ensure consideration, written comments must be received no later than March 13, 2006. Our practice is to make comments, including names and addresses of respondents, available for public review during regular business hours. Individual respondents may request that we withhold their home addresses from the record, which we will honor to the extent allowable by law.

SUPPLEMENTARY INFORMATION: Eufaula National Wildlife Refuge was established in 1964 to provide food and resting habitat for migratory waterfowls and wood ducks. It consists of 11,184 acres and several conservation easements and fee title tracts. The refuge occupies the upper portion of the Corps of Engineers' Walter F. George Reservoir (Lake Eufaula).

Some of the recreation and education opportunities on the refuge include hunting, fishing, photography, and wildlife observation. Approximately 325,000 people visit the refuge annaully.

The Service will conduct a comprehensive conservation planning process that will provide opportunity for state and local governments, agencies, organizations, and the public to participate in issue scoping and public comment. Comments received by the planning team will be used as part of the planning process.

Authority: This notice is published under the authority of the National Wildlife Refuge System Improvement Act of 1997, Public Law 105–57.

Dated: October 27, 2005.

Cynthia K. Dohner,

Acting Regional Director.

[FR Doc. 06–732 Filed 1–25–06; 8:45 am]

BILLING CODE 4310–55–M

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Receipt of Applications for Permit

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of receipt of applications for permit.

SUMMARY: The public is invited to comment on the following applications to conduct certain activities with endangered species.

DATES: Written data, comments or requests must be received by February 27, 2006.

ADDRESSES: Documents and other information submitted with these applications are available for review, subject to the requirements of the Privacy Act and Freedom of Information Act, by any party who submits a written request for a copy of such documents within 30 days of the date of publication of this notice to: U.S. Fish and Wildlife Service, Division of Management Authority, 4401 North Fairfax Drive, Room 700, Arlington, Virginia 22203; fax 703/358–2281.

FOR FURTHER INFORMATION CONTACT: Division of Management Authority, telephone (703) 358–2104.

SUPPLEMENTARY INFORMATION:

Endangered Species

The public is invited to comment on the following applications for a permit to conduct certain activities with endangered species. This notice is provided pursuant to section 10(c) of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*). Written data, comments, or requests for copies of these complete applications should be submitted to the Director (address above).

Applicant: National Zoological Park, Washington, DC, PRT–111394.

The applicant requests a permit to import 4 male and 4 female captive-bred Japanese giant salamanders (*Andrias japonicus*) from the Asa Zoological Park, Japan, for the purpose of enhancement of the survival of the species.

Applicant: Animal Ark, Inc., Reno, NV, PRT–110361.

The applicant requests a permit to import two male captive-bred cheetahs (*Acinonyx jubatus*) from the De Wildt Cheetah and Wildlife Centre, South Africa for the purpose of enhancement of the survival of the species.

Dated: January 6, 2006.

Michael L. Carpenter,

Senior Permit Biologist, Branch of Permits, Division of Management Authority.

[FR Doc. E6–949 Filed 1–25–06; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Issuance of Permits

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of issuance of permits for endangered species and/or marine mammals.

SUMMARY: The following permits were issued.

ADDRESSES: Documents and other information submitted with these applications are available for review, subject to the requirements of the Privacy Act and Freedom of Information Act, by any party who submits a written request for a copy of such documents to: U.S. Fish and Wildlife Service, Division of Management Authority, 4401 North Fairfax Drive, Room 700, Arlington, Virginia 22203; fax (703) 358–2281.

FOR FURTHER INFORMATION CONTACT: Division of Management Authority, telephone (703) 358–2104.

SUPPLEMENTARY INFORMATION: Notice is hereby given that on the dates below, as authorized by the provisions of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*), and/or the Marine Mammal Protection Act of 1972, as amended (16 U.S.C. 1361 *et seq.*), the Fish and Wildlife Service issued the requested permits subject to certain conditions set forth therein. For each permit for an endangered species, the Service found that (1) the application was filed in good faith, (2) the granted permit would not operate to the disadvantage of the endangered species, and (3) the granted permit would be consistent with the purposes and policy set forth in Section 2 of the Endangered Species Act of 1973, as amended.

Endangered Species

Permit number	Applicant	Receipt of application **Federal Register** notice	Permit issuance date
781606	Cynthia Lagueux, Wildlife Conservation Society	70 FR 11020; March 7, 2005	December 7, 2005.
105568	U.S. Geological Survey, National Wildlife Health Center, Honolulu, HI.	70 FR 39786; July 11, 2005	December 20, 2005.

Dated: January 6, 2006.

Michael L. Carpenter,

Senior Permit Biologist, Branch of Permits, Division of Management Authority.

[FR Doc. E6–950 Filed 1–25–06; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Receipt of Applications for Endangered Species Permits

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice.

SUMMARY: The public is invited to comment on the following applications to conduct certain activities with endangered species.

DATES: We must receive written data or comments on these applications at the address given below, by February 27, 2006.

ADDRESSES: Documents and other information submitted with these applications are available for review, subject to the requirements of the Privacy Act and Freedom of Information Act, by any party who submits a written request for a copy of such documents to the following office within 30 days of the date of publication of this notice: U.S. Fish and Wildlife Service, 1875 Century Boulevard, Suite 200, Atlanta, Georgia 30345 (Attn: Victoria Davis, Permit Biologist).

FOR FURTHER INFORMATION CONTACT: Victoria Davis, telephone 404/679–4176; facsimile 404/679–7081.

SUPPLEMENTARY INFORMATION: The public is invited to comment on the following applications for permits to conduct certain activities with endangered and threatened species. This notice is provided under section 10(c) of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*). If you wish to comment, you may submit comments by any one of the following methods. You may mail comments to the Services Regional Office (see **ADDRESSES** section) or via electronic mail (e-mail) to *victoria_davis@fws.gov.* Please submit electronic comments as an ASCII file avoiding the use of special characters and any form of encryption. Please also include your name and return address in your e-mail message. If you do not receive a confirmation from the Service that we have received your e-mail message, contact us directly at the telephone number listed above (see **FOR FURTHER INFORMATION CONTACT** section). Finally, you may hand deliver

comments to the Service office listed above (see **ADDRESSES** section).

Our practice is to make comments, including names and home addresses of respondents, available for public review during regular business hours. Individual respondents may request that we withhold their home address from the administrative record. We will honor such requests to the extent allowable by law. There may also be other circumstances in which we would withhold from the administrative record a respondent's identity, as allowable by law. If you wish us to withhold your name and address, you must state this prominently at the beginning of your comments. However, we will not consider anonymous comments. We will make all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, available for public inspection in their entirety.

TE117405–0

Applicant: Tennessee Valley Authority, Dr. Kathryn Jackson, Knoxville, Tennessee

The applicant requests authorization to take (capture, identify, release, collect relict shells and dead specimen) all listed arachnids, mussels, snails, insects, crustaceans, fishes, amphibians, reptiles, birds, mammals, and plants in the states of Alabama, Georgia, Kentucky, Tennessee, Mississippi, North Carolina, and Virginia. Take would occur while conducting presence/absence surveys and population monitoring.

TE117793–0

Applicant: Florida Department of Transportation, District VI, Alice N. Bravo, Miami, Florida

The applicant requests authorization to take (capture and release) the Key Largo woodrat (*Neotoma floridana smalli*) and the Key Largo cotton mouse (*Peromyscus gossypinus allapaticola*) while conducting presence and absence surveys. The proposed activities would occur in Crocodile Lake National Wildlife Refuge, Key Largo, Monroe County, Florida.

Dated: December 29, 2005.

Cynthia K. Dohner,

Acting Regional Director.

[FR Doc. E6–973 Filed 1–25–06; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[CO–922–05–1310–FI; COC66903]

Notice of Proposed Reinstatement of Terminated Oil and Gas Lease COC66903

AGENCY: Bureau of Land Management; Interior.

ACTION: Notice of Proposed Reinstatement of Terminated Oil and Gas Lease

SUMMARY: Pursuant to the provisions of 30 U.S.C. 188(d) and (e), and 43 CFR 3108.2–3(a) and (b)(1), a petition for reinstatement of oil and gas lease COC66903 for lands in Phillips County, Colorado, was timely filed and was accompanied by all the required rentals accruing from the date of termination.

FOR FURTHER INFORMATION CONTACT: Bureau of Land Management, Beverly A. Derringer, Chief, Fluid Minerals Adjudication, at 303. 239.3765.

SUPPLEMENTARY INFORMATION: The lessee has agreed to the amended lease terms for rentals and royalties at rates of $10.00 per acre, or fraction thereof, per year and 16⅔ percent, respectively. The lessee has paid the required $500 administrative fee and $155 to reimburse the Department for the cost of this **Federal Register** notice. The lessee has met all the requirements for reinstatement of the lease as set out in section 31(d) and (e) of the Mineral Lands Leasing Act of 1920 (30 U.S.C. 188), and the Bureau of Land Management is proposing to reinstate lease COC60770 effective September 1, 2004, subject to the original terms and conditions of the lease and the increased rental and royalty rates cited above.

Dated: April 19, 2005.

Beverly A. Derringer,

Chief, Fluid Minerals Adjudication.

Editorial Note: This document was received at the Office of the Federal Register January 23, 2006.

[FR Doc. E6–1009 Filed 1–25–06; 8:45 am]

BILLING CODE 4310–JB–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[UT–100–1430–ES; U–82059]

Notice of Realty Action

AGENCY: Bureau of Land Management (BLM), Interior.

ACTION: Notice of Realty Action; Recreation and Public Purposes (R&PP) Act Classification; Utah.

SUMMARY: 304 acres of public land, located in Washington County, Utah, has been examined and found suitable for classification for lease to the City of Hurricane under the provisions of the Recreation and Public Purposes Act, as amended.

FOR FUTHER INFORMATION CONTACT: Kathy Abbott, BLM Realty Specialist, at (435) 688–3234.

SUPPLEMENTARY INFORMATION: The following described 304 acres of public land in Washington County, Utah has been examined and found suitable for lease for recreational or public purposes under provisions of the Recreation and Public Purposes Act as amended (43 U.S.C. 869 et seq.):

Salt Lake Meridian

T. 42 S., R. 14 W., sec. 21, NE¼SE¼, portions of SE¼SE¼;
sec. 22, portions of NW¼NE¼, S½SE¼SE¼NE¼, portions of NE¼NW¼, E½SW½SW½, W½SE¼SW¼, NE¼SE¼,
sec. 26, NW¼NW¼, portions of SW¼NW¼;
sec. 27, portions of N½N½.

The City of Hurricane has filed an application pursuant to the Recreation and Public Purposes Act, as amended. The City of Hurricane proposes to the use the land for a public golf course and trail system. The public land is not required for any Federal purpose. Lease is consistent with current Bureau planning for this area and would be in the public interest. The lease, when issued, would be subject to the following terms, conditions, and reservations:

1. Provisions of the Recreation and Public Purposes Act and all applicable regulations of the Secretary of the Interior.

2. A right-of-way for ditches and canals constructed by the authority of the United States.

3. All minerals are reserved to the United States, together with the right to prospect for, mine, and remove the minerals, under applicable laws and regulations established by the Secretary of the Interior.

4. Those rights for a water pipeline granted to St. George City by right-of-way U–39728.

5. Those rights for a power line granted to St. George City by right-of-way U–39546.

6. Those rights for a power line granted to Dixie Rural Electrification Association by right-of-way U–1072.

Detailed information concerning this action is available at the office of the

Bureau of Land Management, St. George Field Office, 345 E. Riverside Drive, St. George, Utah 84790. The land will be segregated from all other forms of appropriation under the public land laws, including the general mining laws, except for leasing under the Recreation and Public Purposes Act and leasing under the mineral leasing laws on January 26, 2006. Interested persons may submit comments regarding the proposed classification, lease of the land to the Field Office Manager, St. George Field Office until March 13, 2006.

Classification Comments: Interested parties may submit comments involving the suitability of the lands for a golf course and trail system. Comments on the classification are restricted to whether the land is physically suited for the proposal, whether the use will maximize the future use or uses of the land, whether the use is consistent with local planning and zoning, or if the use is consistent with State and Federal programs. Any adverse comments will be reviewed by the State Director. In the absence of any adverse comments, the classification will become effective on March 27, 2006.

Application Comments: Interested parties may submit comments regarding the specific use proposed in the City of Hurricane's application, whether the BLM followed proper administrative procedures in reaching the decision, or any other factor not directly related to the suitability of the land for golf course and trail purposes. Any adverse comments will be reviewed by the State Director. In the absence of any adverse comments, the decision to lease will become the final decision of the Department of the Interior.

Dated: December 14, 2005.

James D. Crisp,

Field Office Manager.

[FR Doc. E6–1010 Filed 1–25–06; 8:45 am]

BILLING CODE 4310–DQ–P

DEPARTMENT OF INTERIOR

Bureau of Land Management

[NM–952–06–1420–BJ]

Notice of Filing of Plats of Survey; New Mexico

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: The plats of survey described below are scheduled to be officially filed in the New Mexico State Office, Bureau of Land Management, Santa Fe, New Mexico, (30) thirty calendar days from the date of this publication.

SUPPLEMENTARY INFORMATION:

New Mexico Principal Meridian, New Mexico

The plat representing the dependent resurvey and survey and subdivision of sections in Township 16 North, Range 4 East, accepted October 27, 2005, for Group 1044 New Mexico.

The plat, in two sheets, representing the dependent resurvey and subdivision of sections for Township 8 North, Range 15 West, accepted September 26, 2005, for Group 1034 New Mexico.

The plat representing the dependent resurvey and survey for Township 2 North, Range 5 West accepted September 6, 2005, for Group 1005 New Mexico.

The plat representing the dependent resurvey and subdivision of sections for Township 2 North, Range 7 West, accepted August 25, 2005, for Group 1005 New Mexico.

The plat representing the dependent resurvey and subdivision of sections for Township 23 North, Range 19 West, accepted September 19, 2005, for Group 1025 New Mexico.

The plat representing the dependent resurvey and subdivision of sections for Township 18 North, Range 19 West, accepted September 19, 2005, for Group 1024 New Mexico.

The plat, in two sheets, representing the dependent resurvey and survey for Township 12 North, Range 12 West, accepted September 30, 2005, for Group 1012 New Mexico.

The plat of the Santa Fe Grant, New Mexico Principal Meridian, in three sheets, representing a dependent resurvey and survey, accepted November 29, 2005, for Group 1045 New Mexico.

Indian Meridian, Oklahoma

The plat representing the dependent resurvey and survey for Township 25 North, Range 9 East, accepted September 6, 2005, for Group 128 Oklahoma.

The plat representing the dependent resurvey and survey for Township 21 North, Range 21 East, accepted September 6, 2005, for Group 113 Oklahoma.

The plat representing the dependent resurvey and survey for Township 18 North, Range 22 East, accepted September 14, 2005, for Group 112 Oklahoma.

The plat representing the dependent resurvey and survey for Township 1 North, Range 6 West, accepted September 19, 2005, for Group 104 Oklahoma.

The plat representing the dependent resurvey and survey for Township 17 North, Range 23 East, accepted September 30, 2005, for Group 105 Oklahoma.

The plat representing the dependent resurvey and survey for Township 5 North, Range 5 West, accepted September 30, 2005, for Group 121 Oklahoma.

The plat representing the dependent resurvey and survey for Township 5 North, Range 6 West, accepted September 29, 2005, for Group 120 Oklahoma.

The plat, in six sheets, representing the dependent resurvey and survey for Township 6 South, Range 6 East, accepted September 30, 2005, for Group 100 Oklahoma.

The plat representing the dependent resurvey of The Modoc Reservation for Township 28 North, Range 25 East, and Township 27 North, Range 25 East, Indian Meridian, Oklahoma, and Township 25 North, Range 34 West, Fifth Principal Meridian, Missouri, accepted November 16, 2005, for Group 101 Oklahoma.

Sixth Principle Meridian, Kansas

The plat, in two sheets, representing the dependent resurvey and survey for Township 8 South, Range 15 East, accepted October 27, 2005, for Group 26 Kansas.

The plat, in two sheets, representing the dependent resurvey and survey for Township 4 South, Range 16 East, accepted November 16, 2005, for Group 27 Kansas.

If a protest against a survey, as shown on any of the above plats is received prior to the date of official filing, the filing will be stayed pending consideration of the protest. A plat will not be officially filed until the day after all protest have been dismissed.

A person or party who wishes to protest against any of these surveys must file a written protest with the New Mexico State Director, Bureau of Land Management, stating that they wish to protest.

A statement of reasons for a protest may be filed with the notice of protest to the State Director, or the statement of reasons must be filed with the State Director within thirty days after the protest is filed.

FOR FURTHER CONTACT INFORMATION: These plats will be available for inspection in the New Mexico State Office, Bureau of Land Management, P.O. Box 27115, Santa Fe, New Mexico, 87502–0115. Copies may be obtained from this office upon payment of $1.10 per sheet.

Dated: January 13, 2006.

Allen Bollschweiler,

Acting Chief Cadastral Surveyor for New Mexico.

[FR Doc. 06–520 Filed 1–25–06; 8:45 am]

BILLING CODE 4310–FB–M

DEPARTMENT OF THE INTERIOR

Bureau of Reclamation

Information Collection Activities Under OMB Review

AGENCY: Bureau of Reclamation, Interior

ACTION: Notice of Data Collection Submission (OMB No. 1006–0014).

SUMMARY: In compliance with the Paperwork Reduction Act (44 U.S.C. 3501 et seq.), this notice announces that the Information Collection Request (ICR) abstracted below for the Lower Colorado River Well Inventory has been forwarded to the Office of Management and Budget (OMB) for review and approval. The ICR describes the nature of the information collection and its expected cost and burden.

DATES: Comments must be submitted on or before February 27, 2006. OMB has up to 60 days to approve or disapprove this information collection, but may respond after 30 days; therefore, public comment should be submitted to OMB within 30 days in order to assure maximum consideration.

ADDRESSES: Comments on this information collection should be submitted to the Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for the Department of the Interior, via facsimile to (202) 395–6566 or e-mail to *OIRA_DOCKET@omb.eop.gov.* A copy of your comments should also be directed to the Bureau of Reclamation, Attention Mr. Jeffrey Addiego, Boulder Canyon Operations Office, P.O. Box 61470, Boulder City, NV 89006–1470.

FOR FURTHER INFORMATION CONTACT: For further information or a copy of the proposed collection of information, contact Mr. Jeffrey Addiego, 702–293–8525, or e-mail at *JAddiego@lc.usbr.gov.*

SUPPLEMENTARY INFORMATION: Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of Reclamation, including whether the information shall have practical use; (b) the accuracy of Reclamation's estimated burden of the proposed collection of information; (c) ways to enhance the quality, use, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology.

Title: Lower Colorado River Well Inventory.

OMB No.: 1006–0014.

Description of respondents: All diversions of mainstream Colorado River water along the lower Colorado River must be accounted for and, for non-Indian diverters, in accordance with a water use contract with the Secretary of the Interior. Each diverter (including well pumpers) must be identified and their diversion locations and water use determined. This requires an inventory of wells along the lower Colorado River and the gathering of specific information concerning each well.

Frequency: These data will be collected only once for each well owner or operator as long as changes in water use, or other changes that would impact contractual or administrative requirements, are not made.

Estimated completion time: An average of 20 minutes is required for Reclamation to interview individual well owners or operators. Reclamation will use the information collected during these interviews to complete the information collection form.

Annual responses: 1,500.

Annual burden hours: 500 hours.

An Agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless its displays a currently valid OMB control number. Reclamation will display a valid OMB control number on the forms.

A **Federal Register** notice with a 60-day comment period soliciting comments on this collection of information was published on July 27, 2005 (70 FR 43450). No comments were received.

Our practice is to make comments, including names and home addresses of respondents, available for public review. Individual respondents may request that we withhold their home address from public disclosure, which we will honor to the extent allowable by law. There also may be circumstances in which we would withhold a respondent's identity from public disclosure, as allowable by law. If you wish us to withhold your name and/or address, you must state this prominently at the beginning of your comment. We will make all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, available for public disclosure in their entirety.

Steven C. Hvinden,

Acting Area Manager, Boulder Canyon Operations Office, Lower Colorado Region.

[FR Doc. 06–736 Filed 1–25–06; 8:45 am]

BILLING CODE 4310–MN–M

DEPARTMENT OF JUSTICE

Notice of Lodging of Consent Decree Under the Comprehensive Environmental Response, Compensation, and Liability Act

Consistent with the policy of 42 U.S.C. 9622(d)(2), notice is hereby given that on January 11, 2006, a proposed Consent Decree in *United States* v. *Daniel Green, et al.,* Civil Action No. 1:00–cv–637, was lodged with the United States District Court for the Southern District in Ohio.

In this action the United States sought reimbursement of response costs incurred for response actions taken at or in connection with the release or threatened release of hazardous substances at the Green Industries Site in Sharonville, Ohio (''the Site'') pursuant to section 107(a) of the Comprehensive Environmental Response, Compensation and Liability Act (''CERCLA''), 42 U.S.C. 9607(a). The Consent Decree resolves the United States' claims against defendants Daniel Green and the Estate of Maurice Green (''Settling Defendants'') on an inability to pay basis. Resolution of claims against Daniel Green terminates the need for inclusion of Saundra Green in this matter as a Rule 19 defendant. The Settling Defendants will collectively pay $100,000.

The Department of Justice will receive for a period of thirty (30) days from the date of this publication comments relating to the Consent Decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, and should refer to *United States* v. *Daniel Green, et al.,* D.J. Ref. 90–11–2–06906.

The Consent Decree may be examined at the Office of the United States Attorney, 221 East Fourth Street, Suite 400, Cincinnati, OH and at U.S. EPA Region 5, 77 West Jackson Blvd., Chicago, IL. During the public comment period, the Consent Decree may also be examined on the following Department of Justice Web site, *http://www.usdoj.gov/enrd/open.html.* A copy of the Consent Decree may also be

obtained by mail from the Consent Decree Library, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611 or by faxing or e-mailing a request to Tonia Fleetwood (*tonia.fleetwood@usdoj.gov*), fax no. (202) 514–0097, phone confirmation number (202) 514–1547. In requesting a copy from the Consent Decree Library, please enclose a check in the amount of $4.00 (25 cents per page reproduction cost) payable to the U.S. Treasury.

William D. Brighton,

Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 06–709 Filed 1–25–06; 8:45 am]

BILLING CODE 4410–15–M

DEPARTMENT OF JUSTICE

Solid Waste Disposal Act, as Amended by the Resource Conservation and Recovery Act (RCRA) Sections 3004 and 3005 of RCRA, 42 U.S.C. 6924 and 6925

In accordance with Departmental policy, 28 CFR 50.7, notice is hereby given that on January 9, 2006, a proposed Consent Decree in *United States and State of Alabama* v. *Northrop Grumman Systems Corporation,* Civil Action No. CV–06–B–0060 NE was lodged with the United States District Court for the Northern District of Alabama.

In this action the United States and State of Alabama allege that Northrop Grumman Systems Corporation (hereafter NGC or defendant) is liable under the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act (RCRA) and the Alabama Hazardous Wastes Management and Minimization Act (''AHWMMA''), Code of Alabama (1975), §§ 22–3–1, *et seq.* for penalties and injunctive relief in connection with the NGC BAT facility near Huntsville, Alabama at Redstone Arsenal, and the NGC Longbow facility in Huntsville.

This consent decree represents a settlement between the United States, State of Alabama and NGC. The consent decree requires NGC to: (1) Pay a penalty of $83,049.50, to be split evenly between the State of Alabama and the United States, and (2) submit certifications within thirty days of entry of the Consent Decree that it is in compliance with the provisions of RCRA and State law it was alleged to have violated. The Department of Justice will receive for a period of thirty (30) days from the date of this publication comments relating to the proposed Consent Decree. Comments should be addressed to the Assistant Attorney General for the Environment and Natural Resources Division, U.S. Department of Justice, P.O. box 7611, Washington, DC 20044, and should refer to *United States and State of Alabama* v. *Northrop Grumman Systems Corporation,* D.J. Ref. 90–7–1–08303.

Commenters may request an opportunity for a public meeting in the affected area, in accordance with Section 7003(d) of the Resource Conservation and Recovery Act (''RCRA''), 42 U.S.C. 6973(d).

The proposed Consent Decree may be examined at the Office of the United States Attorney, Northern District of Alabama, 1801 4th Avenue North, Birmingham, Alabama 35203, and at Region 4, Office of the Environmental Protection Agency, Atlanta Federal Center, 61 Forsyth Street, SW., Atlanta, Georgia 30303. During the public comment period, the Consent Decree may also be examined on the following Department of Justice Web site: *http://www.usdoj.gov/enrd/open.html.* A copy of the consent decree may also be obtained by mail from the Consent Decree Library, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, or by faxing or e-mailing a request to Tonia Fleetwood (*tonia.fleetwood@usdoj.gov*), fax. No. (202) 514–0097, phone confirmation number (202) 514–1547. In requesting a copy, please enclose a check in the amount of $4.75 (25 cents per page reproduction cost) payable to the U.S. Treasury.

Ellen Mahan,

Assistant Section Chief, Environment and Natural Resources Division.

[FR Doc. 06–711 Filed 1–25–06; 8:45 am]

BILLING CODE 4410–15–M

DEPARTMENT OF JUSTICE

Notice of Lodging of Consent Decree Under the Comprehensive Environmental Response, Compensation and Liability Act

Under 28 CFR 50.7, notice is hereby given that on December 29, 2005, a proposed consent decree in *United States* v. *9.67 Acres of Land, More or Less, Located at 350 Mt Pleasant Avenue, Borough of Wallington, Bergen County, New Jersey,* Civil Action No. 01–cv–3382, was lodged with the United States District Court for the District of New Jersey.

In this *in rem* action, the United States sought cost recovery for costs incurred in connection with the Industrial Latex Superfund Site located in the Borough of Wallington, Bergen County, New Jersey (the ''Site''). Under the terms of the consent decree, the Site property will be sold and the proceeds divided among the settling parties.

The Department of Justice will receive for a period of thirty (30) days from the date of this publication comments relating to the consent decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, and should refer to *United States* v. *9.67 Acres of Land, More or Less, Located at 350 Mt Pleasant Avenue, Borough of Wallington, Bergen County, New Jersey,* Civil Action No. 01–cv–3382, D.J. Ref. 90–11–3–07502.

The consent decree may be examined at the Office of the United States Attorney, Peter Rodino Federal Building, 970 Broad Street, Suite 700, Newark, NJ 07102 and at U.S. EPA Region II, 290 Broadway, New York, NY 10007. A copy of the consent decree may also be examined on the following Department of Justice Web site, *http://www.usdoj.gov/enrd/open.html.* A copy of the consent decree may also be obtained by mail from the Consent Decree Library, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611 or by faxing or e-mailing a request to Tonia Fleetwood (*tonia.fleetwood@usdoj.gov*), fax no. (202) 514–0097, phone confirmation number (202) 514–1547. In requesting a copy of the consent decree without appendices, please enclose a check in the amount of $18.25 (25 cents per page reproduction cost) payable to the U.S. Treasury.

Ronald Gluck,

Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 06–710 Filed 1–25–06; 8:45 am]

BILLING CODE 4410–15–M

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—AAF Association, Inc.

Notice is hereby given that, on December 28, 2005, pursuant to section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act'') AAF Association, Inc. has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were

filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, Ninsight, Issy les Moulineaux, France; and RPPtv Ltd., West Sussex, United Kingdom have been added as parties to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and AAF Association, Inc. intends to file additional written notification disclosing all changes in membership.

On March 28, 2000, AAF Association, Inc. filed its original notification pursuant to section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to section 6(b) of the Act on June 29, 2000 (65 FR 40127).

The last notification was filed with the Department on September 21, 2005. A notice was published in the **Federal Register** pursuant to section 6(b) of the Act on October 17, 2005 (70 FR 60369).

Dorothy B. Fountain,

Deputy Director of Operations, Antitrust Division.

[FR Doc. 06–719 Filed 1–25–06; 8:45 am]

BILLING CODE 4410–11–M

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—Interchangeable Virtual Instruments Foundation, Inc.

Notice is hereby given that, on January 6, 2006, pursuant to section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), Interchangeable Virtual Instruments Foundation, Inc. has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, Advantest Corporation, Tokyo, Japan; and Honeywell Tech Solutions, Bangalore, India have withdrawn as parties to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and Interchangeable Virtual Instruments Foundation, Inc. intends to file additional written notification disclosing all changes in membership.

On May 29, 2001, Interchangeable Virtual Instruments Foundation, Inc. filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to section 6(b) of the Act on July 30, 2001 (66 FR 39336).

The last notification was filed with the Department on July 20, 2005. A notice was published in the **Federal Register** pursuant to section 6(b) of the Act on August 12, 2005 (70 FR 47232).

Dorothy B. Fountain,

Deputy Director of Operations, Antitrust Division.

[FR Doc. 06–721 Filed 1–25–06; 8:45 am]

BILLING CODE 4410–11–M

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—PXI Systems Alliance, Inc.

Notice is hereby given that, on January 6, 2006, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C 4301 *et seq.* (''the Act''), PXI Systems Alliance, Inc. has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, Marek Micro, Sulzbach-Rosenberg, Germany; and 4DSP, Inc., Reno, NV have withdrawn as parties to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and PXI Systems Alliance, Inc. intends to file additional written notification disclosing all changes in membership.

On November 22, 2000, PXI Systems Alliance, Inc. filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on March 8, 2001 (66 FR 13971).

The last notification was filed with the Department on October 11, 2005. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on November 3, 2005 (70 FR 66851).

Dorothy B. Fountain,

Deputy Director of Operations, Antitrust Division.

[FR Doc. 06–720 Filed 1–25–06; 8:45 am]

BILLING CODE 4410–11–M

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Manufacturer of Controlled Substances; Notice of Registration

By Notice dated November 22, 2004, and published in the **Federal Register** on December 6, 2004, (69 FR 70470–70471), Johnson Matthey, Inc., Custom Pharmaceuticals Department, 2003 Nolte Drive, West Deptford, New Jersey 08066, made application by renewal to the Drug Enforcement Administration (DEA) to be registered as a bulk manufacturer of the basic classes of controlled substances listed in Schedules I and II:

Drug	Schedule
Tetrahydrocannabinols (7370)	I
Difenoxin (9168)	I
Propiram (9649)	I
Amphetamine (1100)	II
Methylphenidate (1724)	II
Codeine (9050)	II
Oxycodone (9143)	II
Hydromorphone (9150)	II
Hydrocodone (9193)	II
Morphine (9300)	II
Thebaine (9333)	II
Alfentanil (9737)	II
Sufentanil (9740)	II
Fentanyl (9801)	II

The company plans to manufacture the listed controlled substances in bulk for distribution to its customers.

No comments or objections have been received. DEA has considered the factors in 21 U.S.C. 823(a) and determined that the registration of Johnson Matthey, Inc. to manufacture the listed basic classes of controlled substances is consistent with the public interest at this time. DEA has investigated Johnson Matthey, Inc. to ensure that the company's registration is consistent with the public interest. The investigation has included inspection and testing of the company's physical security systems, verification of the company's compliance with state and local laws, and a review of the company's background and history. Therefore, pursuant to 21 U.S.C. 823, and in accordance with 21 CFR 1301.33, the above named company is granted registration as a bulk manufacturer of

the basic classes of controlled substances listed.

Dated: January 18, 2006.

Joseph T. Rannazzisi,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. E6–939 Filed 1–25–06; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF LABOR

Office of the Secretary

Submission for OMB Review: Comment Request

January 20, 2006.

The Department of Labor (DOL) has submitted the following public information collection requests (ICRs) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. chapter 35). A copy of each ICR, with applicable supporting documentation, may be obtained by contacting Darrin King on 202–693–4129 (this is not a toll-free number) or e-mail: *king.darrin@dol.gov.*

Comments should be sent to Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for the Mine Safety and Health Administration (MSHA), Office of Management and Budget, Room 10235, Washington, DC 20503, 202–395–7316 (this is not a toll-free number), within 30 days from the date of this publication in the **Federal Register**.

The OMB is particularly interested in comments which:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses.

Agency: Mine Safety and Health Administration.

Type of Review: Extension of currently approved collection.

Title: Records of Mine Closures, Opening and Reopening of Mines.

OMB Number: 1219–0073.

Frequency: On occasion; Semi-annually; and Annually

Type of Response: Recordkeeping and Reporting.

Affected Public: Business or other for-profit.

Estimated Number of Respondents: 1,586.

Estimated Annual Responses: 786.

Estimated Average Response Time: Varies by task and mine size.

Estimated Annual Burden Hours: 15,936.

Total Annualized capital/startup costs: $0.

Total Annual Costs (operating/maintaining systems or purchasing services): $18,292,611.

Description: Title 30 CFR 75.1200, 75.1200–1, 75.1201, 75.1202, 75.1202–1, and 75.1203 require underground coal mine operators to have in a fireproof repository in an area on the surface of the mine chosen by the mine operator to minimize the danger of destruction by fire or other hazards, an accurate and up-to-date map of such mine drawn on scale. These standards specify the information which must be shown, the range of acceptable scale, the surveying technique or equivalent accuracy required of the surveying which must be used to prepare the map, that the maps must be certified as accurate by a registered engineer or surveyor, that the maps must be kept continuously up-to-date by temporary notations and must be revised and supplemented to include the temporary notations at intervals not more than 6 months. In addition, the mine operator must provide the MSHA District Manager a copy of the certified mine map annually during the operating life of the mine.

These maps are essential to the planning and safe operation of the mine. In addition, these maps provide a graphic presentation of the locations of working sections and the locations of fixed surface and underground mine facilities and equipment, escape way routes, coal haulage and man and materials haulage entries and other information essential to mine rescue or mine fire fighting activities in the event of mine fire, explosion or inundations of gas or water. The information is essential to the safe operation of adjacent mines and mines approaching the worked out areas of active or abandoned mines. Section 75.372 requires underground mine operators to submit three copies of an up-to-date mine map to the District Manager at intervals not exceeding 12 months.

Title 30 CFR 75.1204 and 75.1204–1 require that whenever an underground coal mine operator permanently closes or abandons a coal mine, or temporarily closes a coal mine for a period of 90 days, the operator shall file with MSHA a copy of the mine map revised and supplemented to the date of closure. Maps are retained in a repository and are made available to mine operators of adjacent properties. The maps are necessary to provide an accurate record of underground areas that have been mined to help prevent active mine operators from mining into abandoned areas that may contain water or harmful gases.

Title 30 CFR 77.1200, 77.1201 and 77.1202 require surface coal mine operators to maintain an accurate and up-to-date map of the mine and specified the information to be shown on the map, the acceptable range of map scales, that the map be certified a registered engineer or surveyor, that the map be available for inspection by the Secretary or his authorized representative. These maps are essential for the safe operation of the mine and provide essential information to operators of adjacent surface and underground mine operators. Properly prepared effectively utilized surface mine maps can prevent outbursts of water impounded in underground mine workings and/or inundations of underground mines by surface impounded water or water and/or gases impounded in surface auger mining worked out areas.

Title 30 75.373 and 75.1721 require that after a mine is abandoned or declared inactive and before it is reopened, mine operations shall not begin until MSHA has been notified and has completed an inspection.

Standard 75.1721 specifies that the notification be in writing and lists specific information, preliminary arrangements and mine plans which must be submitted to the MSHA District Manager.

Agency: Mine Safety and Health Administration.

Type of Review: Extension of currently approved collection.

Title: Approval, Exhaust Gas Monitoring, and Safety Requirements for the Use of Diesel-Powered Equipment in Underground Coal Mines.

OMB Number: 1219–0119.

Frequency: On occasion.

Type of Response: Recordkeeping.

Affected Public: Business or other for-profit.

Estimated Number of Respondents: 181.

Estimated Annual Responses: 147,657.

Estimated Average Response Time: Varies by task and mine size.

Estimated Annual Burden Hours: 144,527.

Total Annualized capital/startup costs: $0.

Total Annual Costs (operating/maintaining systems or purchasing services): $349,888.

Description: These records are directly associated with the maintenance and use of this diesel equipment, the testing and maintenance of fire suppression systems on the equipment and at fueling stations; the safe storage, transportation and use of diesel fuel; and, exhaust gas sampling provisions to protect miners' health. The records are required to document that essential testing and maintenance of the equipment is done regularly and by qualified persons. Second, the safety requirements for diesel equipment include many of the proven features required in existing standards for electric-powered mobile equipment, such as cabs or canopies, methane monitors, brakes and lights. Third, sampling of diesel exhaust emissions is required to protect miners from overexposure to carbon monoxide and nitrogen dioxide contained in diesel exhaust.

Recordkeeping requirements are found in:

§ 75.1901(a)—Diesel fuel requirements;
§ 75.1904(b)(4)(i)—Underground diesel fuel tanks and safety cans;
§§ 75.1911(i) and (j)—Fire suppression systems for diesel-powered equipment and fuel transportation units;
§§ 75.1912(h) and (i)—Fire suppression systems for permanent underground diesel fuel storage facilities;
§§ 75.1914(f)(1), (f)(2), (g)(5), (h)(1), and (h)(2)—Maintenance of diesel-powered equipment;
§§ 75.1915(a), (b)(5), (c)(1), and (c)(2)—Training and qualification of persons working on diesel-powered equipment.

Ira L. Mills,

Departmental Clearance Officer.

[FR Doc. E6–980 Filed 1–25–06; 8:45 am]

BILLING CODE 4510–43–P

DEPARTMENT OF LABOR

Bureau of Labor Statistics

Proposed Collection; Comment Request

ACTION: Notice.

SUMMARY: The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden, conducts a pre-clearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA95) [44 U.S.C. 3506(c)(2)(A)]. This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. The Bureau of Labor Statistics (BLS) is soliciting comments concerning the extension of the Labor Market Information (LMI) Cooperative Agreement. A copy of the proposed information collection request (ICR) can be obtained by contacting the individual listed below in the **ADDRESSES** section of this notice.

DATES: Written comments must be submitted to the office listed in the **ADDRESSES** section of this notice on or before March 27, 2006.

ADDRESSES: Send comments to Amy A. Hobby, BLS Clearance Officer, Division of Management Systems, Bureau of Labor Statistics, Room 4080, 2 Massachusetts Avenue, NE., Washington, DC 20212, telephone 202–691–5118 (this is not a toll free number).

FOR FURTHER INFORMATION CONTACT: Amy A. Hobby, BLS Clearance Officer, telephone 202–691–5118. (See **ADDRESSES** section).

SUPPLEMENTARY INFORMATION:

I. Background

The BLS enters into Cooperative Agreements with State Workforce Agencies (SWAs) annually to provide financial assistance to the SWAs for the production and operation of the following LMI statistical programs: Current Employment Statistics, Local Area Unemployment Statistics, Occupational Employment Statistics, Quarterly Census of Employment and Wages, and Mass Layoff Statistics. The Cooperative Agreement provides the basis for managing the administrative and financial aspects of these programs. The application package being submitted to OMB is representative of the package sent every year to State agencies.

II. Current Action

The BLS requests approval for a Generic LMI Cooperative Agreement from the Office of Management and Budget (OMB). This is not a new collection, but for the first time the BLS is soliciting comments on the application package—without its program work statements—as a Generic Cooperative Agreement application. The work statements will be submitted separately to OMB for review of any minor year-to-year information collection burden changes they may contain. The existing collection of information allows Federal staff to negotiate the Cooperative Agreement with the SWAs and monitor their financial and programmatic performance and adherence to administrative requirements imposed by common regulations implementing OMB Circular A–102 and other grant-related regulations. The information collected also is used for planning and budgeting at the Federal level and in meeting Federal reporting requirements.

III. Desired Focus of Comments

The BLS is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submissions of responses.

Type of Review: Extension of a currently approved collection.

Agency: Bureau of Labor Statistics.

Title: Labor Market Information (LMI) Cooperative Agreement.

OMB Number: 1220–0079.

Affected Public: State, local or tribal governments.

Frequency: Monthly, quarterly, annually.

Information collection	Respondents	Frequency	Responses	Time	Total hours
Work Statements	55	1	55	1–2 hr.	55–110
BIF (LMI 1A, 1B)	55	1	55	1–6 hr.	55–330
Quarterly Automated Financial Reports	48	4	192	10–50 min.	32–160
Monthly Automated Financial Reports	48	*8	384	5–25 min.	32–160
BLS Cooperative Statistics Financial Report (LMI 2A)	7	12	84	1–5 hr.	84–420
Quarterly Status Report (LMI 2B)	1–30	4	4–120	1 hr.	4–120
Budget Variance Request Form	1–55	1	1–55	5–25 min.	0–23
Total	1–55		775–945		262–1323
Average Totals	55		860		793

* Reports are not received for end-of-quarter months, *i.e.*, December, March, June, September.

Total Burden Cost (capital/startup): $0.

Total Burden Cost (operating/maintenance): $0.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of the information collection request; they also will become a matter of public record.

Signed at Washington, DC, this 19th day of January 2006.

Cathy Kazanowski

Chief, Division of Management Systems, Bureau of Labor Statistics.

[FR Doc. E6–981 Filed 1–25–06; 8:45 am]

BILLING CODE 4510–24–P

MILLENNIUM CHALLENGE CORPORATION

[MCC FR 06–01]

Notice of the February 8, 2006 Millennium Challenge Corporation Board of Directors Meeting; Sunshine Act Meeting

AGENCY: Millennium Challenge Corporation.

TIME AND DATE: 2 p.m. to 3:45 p.m., Wednesday, February 8, 2006.

PLACE: Department of State, 2201 C Street, NW., Washington, DC 20520.

FOR FURTHER INFORMATION CONTACT: Information on the meeting may be obtained from Joyce B. Lanham via e-mail at *Board@mcc.gov* or by telephone at (202) 521–3600.

STATUS: Meeting will be closed to the public.

MATTERS TO BE CONSIDERED: The Board of Directors (the ''Board'') of the Millennium Challenge Corporation (''MCC'') will hold a meeting to discuss and consider Threshold Country Program submissions of two countries that are eligible for FY 2006 Millennium Challenge Account (''MCA'') assistance under section 616 of the Millennium Challenge Act of 2003 (the ''Act''); an MCC Operations update; Compact development issues related to MCA-eligible countries; and certain administrative matters. The agenda items are expected to involve the consideration of classified information and will be closed to the public.

Dated: January 24, 2006.

Jon A. Dyck,

Vice President and General Counsel, Millennium Challenge Corporation.

[FR Doc. 06–785 Filed 1–24–06; 10:33 am]

BILLING CODE 9210–01–P

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

Sunshine Act, Meetings

January 17, 2006.

TIME AND DATE: 10 a.m., Thursday, January 26, 2006.

PLACE: The Richard V. Backley Hearing Room, 9th Floor, 601 New Jersey Avenue, NW., Washington, DC.

STATUS: Open.

MATTERS TO BE CONSIDERED: The Commission will hear oral argument on the matter *Secretary of Labor* v. *Sedgman*, Docket Nos. SE 2002–11, SE 2003–69, and SE 2003–189. (Issues include whether the Administrative Law Judge properly concluded that Sedgman violated 39 CFR 77.200; whether the judge properly held that the Secretary of Labor did not abuse her discretion in citing Sedgman for violations of 30 CFR 77.200 and 77.1710(g); whether the judge properly followed the statutory penalty criteria set forth at 30 U.S.C. 820(i) in setting a penalty for the section 77.200 violation; and whether the judge was correct in deciding to vacate the penalty he assessed for the section 77.200 violation because there was an unreasonable delay by the Secretary in proposing the penalty.)

Any person attending this oral argument who requires special accessibility features and/or auxiliary aids, such as sign language interpreters, must inform the Commission in advance of those needs, subject to 29 CFR 2706.150(a)(3) and 2706.160(d).

CONTACT PERSON FOR MORE INFO: Jean Ellen, (202) 434–9950 / (202) 708–9300 for TDD Relay / 1–800–877–8339 for toll free.

Jean H. Ellen,

Chief Docket Clerk.

[FR Doc. 06–802 Filed 1–24–06; 1:23 pm]

BILLING CODE 6735–01–M

NATIONAL SCIENCE FOUNDATION

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: National Science Foundation.

ACTION: Notice.

SUMMARY: The National Science Foundation (NSF) is announcing plans to request establishment and clearance of this collection. In accordance with the requirement of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, we are providing opportunity for public comment on this action. After obtaining and considering public comment, NSF will prepare the submission requesting OMB clearance of this collection for no longer than 3 years.

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Agency, including whether the information shall have practical utility; (b) the accuracy of the Agency's estimate of the burden of the proposed colleciton of information; (c) ways to enhance the quality, utility, and clarity of the information on respondents, including through the use of automated collection techniques or other forms of information technology; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

DATES: Written comments should be received by March 27, 2006 to be

assured of consideration. Comments received after that date will be considered to the extent practicable.

ADDRESSES: Written comments regarding the information collection and requests for copies of the proposed information collection request should be addressed to Suzanne Plimpton, Reports Clearance Officer, National Science Foundation, 4201 Wilson Blvd., Rm. 295, Arlington, VA 22230, or by e-mail to *splimpto@nsf.gov.*

FOR FURTHER INFORMATION CONTACT: Suzanne Plimpton on (703) 292–7556 or send e-mail to *splimpto@nsf.gov.* Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern time, Monday through Friday.

SUPPLEMENTARY INFORMATION:

Request for Clearance for Program Evaluation of the National Science Foundation's (NSF) Faculty Early Career Development (CAREER) Program.

Title of Collection: Evaluation of the National Science Foundation's (NSF) Faculty Early Career Development (CAREER) Program.

OMB Control No.: 3145–(NEW).

Expiration Date of Approval: Not applicable.

Abstract: The National Science Foundation (NSF) requests a three-year clearance for research, evaluation and data collection (*e.g.,* surveys and interviews) from actual and potential applicants to and other stakeholders in the Faculty Early Career Development Program (CAREER). CAREER stakeholders typically are limited to PhD scientists and engineers and faculty and administrators from universities and not-for-profit institutions (*e.g.,* museums, non-degree granting educational or research institutions), and former NSF employees and intergovernmental personnel act (IPA) appointees. A preliminary, predecessor study to this new evaluation research was approved through September 2001 as an external (third-party) program evaluation under the EHR Generic Clearance (OMB 345–0136). The earlier CAREER study was conducted by Abt Associates, Inc., Cambridge, MA, and it examined only the first three years that NSF provided CAREER grants to eligible institutions in Fiscal Years (FY) 1995 through 1997. A copy of Abt's final report to NSF entitled Faculty Early Career Development (CAREER) Program: *External Evaluation Summary Report* (NSF 01–134) was posted in August 2001 on NSF's Web site and remains available at: *http://www.nsf.gov/pubs/2001/nsf01134/pdf.* The new CAREER program evaluation is estimated to cover from FY 1995 through FY 2005.

NSF established the CAREER Program to support career-development for beginning teacher-scholars in Science, Technology, Engineering and Mathematics (STEM), within the context of the mission of their employing organization. CAREER typically awards a grant to support the research and educational activities conducted by individual scientists and engineers with PhDs (or the equivalent). For specific details and the most updated information regarding CAREER program operations, please visit the NSF Web site at: *http://www.nsf.gov/funding/pgm_summ.jsp?pims_id=5262&from-fund.*

NSF has contracted a new program evaluation of CAREER, to be conducted by Abt Associates Inc. Through this new evaluation of the CAREER Program NSF aims to identify, measure and document:

(1) The longer-term impacts of this program on the research activities, educational activities and career advancement of CAREER awardees;

(2) the program's impacts on the integration of research and education by individual STEM faculty;

(3) the impacts of the CAREER program on the institutions (including at the department or other sub-institutional level) that administer the NSF funding to a CAREER scientist or engineer; and

(4) changes within NSF that may be attributed to the CAREER program's operations, benefiting scientists and engineers, and other CAREER stake holders.

The primary methods of data collection will include meta-data collection from open sources and from records at NSF and grantee institutions; surveys, institutional site visits, and in-person and telephone interviews. There is a bounded (or limited) number of respondents within the general public who will be affected by this research, including current and former CAREER awardees, scientists and engineers currently or once eligible to apply to CAREER, other scientists and engineers and the STEM research and education committees. NSF will use the CAREER program evaluation data and analyses to respond to requests from Committees of Visitors (COV), Congress and the Office of Management and Budget, particularly as related to the Government Performance and Results Act (GPRA) and the Program Effectiveness Rating Tool (PART). NSF will also use the program evaluation to improve communication with CAREER stakeholders and to share the broader impacts of the CAREER program with the general public.

Respondents: Individuals or households, Business or other for profit, Federal Government, State, Local or Tribal Government and not-for-profit institutions.

Estimated Number of Respondents: 4,000.

Burden on the Public: 2,000 hours.

Dated: January 20, 2006.

Suzanne H. Plimpton,

Reports Clearance Officer, National Science Foundation.

[FR Doc. 06–712 Filed 1–25–06; 8:45 am]

BILLING CODE 7555–01–M

OFFICE OF MANAGEMENT AND BUDGET

Discount Rates for Cost-Effectiveness Analysis of Federal Programs

AGENCY: Office of Management and Budget.

ACTION: Revisions to Appendix C of OMB Circular A–94.

SUMMARY: The Office of Management and Budget revised Circular A–94 in 1992. The revised Circular specified certain discount rates to be updated annually when the interest rate and inflation assumptions used to prepare the budget of the United States Government were changed. These discount rates are found in Appendix C of the revised Circular. The updated discount rates are shown below. The discount rates in Appendix C are to be used for cost-effectiveness analysis, including lease-purchase analysis, as specified in the revised Circular. They do not apply to regulatory analysis.

DATES: The revised discount rates are effective immediately and will be in effect through January 2007.

FOR FURTHER INFORMATION CONTACT: Robert B. Anderson, Office of Economic Policy, Office of Management and Budget, (202) 395–3381.

James D. Foster,

Associate Director for Economic Policy, Office of Management and Budget.

Appendix C—Discount Rates for Cost-Effectiveness, Lease Purchase, and Related Analyses

Revised January 2006.

Effective Dates. This appendix is updated annually around the time of the President's budget submission to Congress. This version of the appendix is valid through the end of January 2007. A copy of the updated appendix can be obtained in electronic form through the OMB home page at *http://www.whitehouse.gov/omb/circulars/a094/*

a94_appx-c.html, the text of the main body of the Circular is found at *http://www.whitehouse.gov/omb/circulars/a094/a094.html*, and a table of past years' rates is located at *http://www.whitehouse.gov/omb/circulars/a094/dischist-2006.pdf*. Updates of the appendix are also available upon request from OMB's Office of Economic Policy (202–395–3381).

Nominal Discount Rates. A forecast of nominal or market interest rates for 2006 based on the economic assumptions from the 2007 Budget are presented below. These nominal rates are to be used for discounting nominal flows, which are often encountered in lease-purchase analysis.

NOMINAL INTEREST RATES ON TREASURY NOTES AND BONDS OF SPECIFIED MATURITIES

[In percent]

3-year	5-year	7-year	10-year	20-year	30-year
4.7	4.8	4.9	5.0	5.3	5.2

Real Discount Rates. A forecast of real interest rates from which the inflation premium has been removed and based on the economic assumptions from the 2007 Budget is presented below. These real rates are to be used for discounting real (constant-dollar) flows, as often required in cost-effectiveness analysis.

REAL INTEREST RATES ON TREASURY NOTES AND BONDS OF SPECIFIED MATURITIES

[In percent]

3-year	5-year	7-year	10-year	20-year	30-year
2.5	2.6	2.7	2.8	3.0	3.0

Analyses of programs with terms different from those presented above may use a linear interpolation. For example, a four-year project can be evaluated with a rate equal to the average of the three-year and five-year rates. Programs with durations longer than 30 years may use the 30-year interest rate.

[FR Doc. E6–963 Filed 1–25–06; 8:45 am]

BILLING CODE 3110–01–P

RAILROAD RETIREMENT BOARD

Proposed Collection; Comment Request

SUMMARY: In accordance with the requirement of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 which provides opportunity for public comment on new or revised data collections, the Railroad Retirement Board (RRB) will publish periodic summaries of proposed data collections.

Comments are invited on: (a) Whether the proposed information collection is necessary for the proper performance of the functions of the agency, including whether the information has practical utility; (b) the accuracy of the RRB's estimate of the burden of the collection of the information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden related to the collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

Title and Purpose of Information Collection

Nonresident Questionnaire; OMB 3220–0145.

Under Public Laws 98–21 and 98–76, benefits under the Railroad Retirement Act payable to annuitants living outside the United States may be subject to taxation under United States income tax laws. Whether the social security equivalent and non-social security equivalent portions of Tier I, Tier II, vested dual benefit, or supplemental annuity payments are subject to tax withholding, and whether the same or different rates are applied to each payment, depends on a beneficiary's citizenship and legal residence status, and whether exemption under a tax treaty between the United States and the country in which the beneficiary is a legal resident has been claimed. To effect the required tax withholding, the Railroad Retirement Board (RRB) needs to know a nonresidents citizenship and legal residence status.

To secure the required information, the RRB utilizes Form RRB–1001, Nonresident Questionnaire, as a supplement to an application as part of the initial application process, and as an independent vehicle for obtaining the needed information when an annuitant's residence or tax treaty status changes. Completion is voluntary. One response is requested of each respondent.

The RRB estimates that 1,300 Form RRB–1001's are completed annually. The completion time for Form RRB–1001 is estimated at 30 minutes. No changes are proposed to Form RRB–1001.

Additional Information or Comments: To request more information or to obtain a copy of the information collection justifications, forms, and/or supporting material, please call the RRB Clearance Officer at (312) 751–3363 or send an e-mail request to *Charles.Mierzwa@RRB.GOV.* Comments regarding the information collection should be addressed to Ronald J. Hodapp, Railroad Retirement Board, 844 N. Rush Street, Chicago, Illinois 60611–2092 or send an e-mail to *Ronald.Hodapp@RRB.GOV.* Comments should be received within 60 days of this notice.

Charles Mierzwa,

Clearance Officer.

[FR Doc. E6–946 Filed 1–25–06; 8:45 am]

BILLING CODE 7905–01–P

SECURITIES AND EXCHANGE COMMISSION

Proposed Collection; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of Filings and Information Services, Washington, DC 20549.

Extension:

Rule 15c2–7; SEC File No. 270–420; OMB Control No. 3235–0479.

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission

(Commission) is soliciting comments on the collection of information summarized below. The Commission plans to submit this existing collection of information to the Office of Management and Budget for extension and approval.

• Rule 15c2–7 Identification of Quotations.

Rule 15c2–7 enumerates the requirements with which all brokers and dealers must comply when submitting a quotation for a security (other than a municipal security) to an inter-dealer quotation system.

It is estimated that there are 8,500 brokers and dealers. Industry personnel estimate that approximately 900 notices are filed pursuant to Rule 15c2–7 annually. Based on industry estimates that respondents complying with Rule 15c2–7 spend 30 seconds to add notice of an arrangement and 1 minute to delete notice of an arrangement, the staff estimates that, on an annual basis, respondents spend a total of 11.25 hours to comply with Rule 15c2–7, based upon past submissions. The average cost per hour is approximately $35. Therefore, the total cost of compliance for brokers and dealers is approximately $393.75.

Written comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimates of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted in writing within 60 days of this publication.

Please direct your written comments to R. Corey Booth, Director/Chief Information Officer, Office of Information Technology, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549.

Dated: January 18, 2006.

Nancy M. Morris,

Secretary.

[FR Doc. E6–970 Filed 1–25–06; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

Issuer Delisting; Notice of Application of CITGO Petroleum Corporation To Withdraw its 7⅞% Senior Notes (Due May 15, 2006), From Listing and Registration on the New York Stock Exchange, Inc. File No. 1–14380

January 20, 2006.

On January 12, 2006, CITGO Petroleum Corporation, a Delaware corporation (''Issuer''), filed an application with the Securities and Exchange Commission (''Commission''), pursuant to section 12(d) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 12d2–2(d) thereunder,[2] to withdraw its 7⅞% senior notes (due May 15, 2006) (''Security''), from listing and registration on the New York Stock Exchange, Inc. (''NYSE'').

On August 30, 2004, the Board of Directors (''Board'') of the Issuer adopted resolutions to withdraw the Security from listing and registration on NYSE. The Issuer stated that the Board determined that it is in the best interest of the Issuer and the holders of the Security to delist the Security from NYSE and to withdraw from registration under section 12(b) of the Act.[3] The Issuer stated the reasons that factored into the Board's decision to withdraw the Security from listing on NYSE included a determination that the benefits of continued listing were outweighed by the administrative burdens, particularly since the adoption of the Sarbanes-Oxley Act of 2002 has resulted in more stringent corporate governance rules and increased costs of compliance. The Issuer also stated that in November 2005, the Issuer completed a tender offer for the Security pursuant to Board approval. As a result of such tender offer, only approximately $14,300,000 of the original $200,000,000 face amount of the Security remains outstanding.

The Issuer stated in its application that it has complied with the NYSE's rules governing an issuer's voluntary withdrawal of a security from listing and registration by complying with all applicable laws in the State of Delaware, in which the Issuer is incorporated, and by providing NYSE with the required documents governing the removal of securities from listing and registration on NYSE.

The Issuer's application relates solely to the withdrawal of the Security from listing on NYSE and from registration under section 12(b) of the Act,[4] and shall not affect its obligation to be registered under section 12(g) of the Act.[5]

Any interested person may, on or before February 10, 2006, comment on the facts bearing upon whether the application has been made in accordance with the rules of NYSE, and what terms, if any, should be imposed by the Commission for the protection of investors. All comment letters may be submitted by either of the following methods:

Electronic Comments

• Use the Commission's Internet comment form (*http://www.sec.gov/rules/delist.shtml*); or

• Send an e-mail to *rule-comments@sec.gov.* Please include the File Number 1–14380 or;

Paper Comments

• Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–9303.

All submissions should refer to File Number 1–14380. This file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/delist.shtml*). Comments are also available for public inspection and copying in the Commission's Public Reference Room. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

The Commission, based on the information submitted to it, will issue an order granting the application after the date mentioned above, unless the Commission determines to order a hearing on the matter.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[6]

Nancy M. Morris,

Secretary.

[FR Doc. E6–971 Filed 1–25–06; 8:45 am]

BILLING CODE 8010–01–P

[1] 15 U.S.C. 78*l*(d).

[2] 17 CFR 240.12d2–2(d).

[3] 15 U.S.C. 78*l*(b).

[4] 15 U.S.C. 78*l*(b).

[5] 15 U.S.C. 78*l*(g).

[6] 17 CFR 200.30–3(a)(1).

SECURITIES AND EXCHANGE COMMISSION

Classified National Security Information

AGENCY: Securities and Exchange Commission.

ACTION: Notice.

SUMMARY: Pursuant to the Information Security Oversight Office's *Classified National Security Information Directive No. 1,* this notice provides the address to which mandatory declassification review requests may be sent. Requests should be addressed to the Securities and Exchange Commission, Office of the Executive Director, 100 F Street, NE., Washington, DC 20549.

Dated: January 20, 2006.

Nancy M. Morris,

Secretary.

[FR Doc. E6–969 Filed 1–25–06; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–53148; File No. SR–Amex–2005–131]

Self-Regulatory Organizations; American Stock Exchange LLC; Notice of Filing and Order Granting Accelerated Approval to a Proposed Rule Change and Amendment No. 1 Thereto Relating to the Implementation of a Quote Risk Manager

January 19, 2006.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 27, 2005, the American Stock Exchange LLC (''Amex'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. On January 13, 2006, the Amex filed Amendment No. 1 to the proposed rule change.[3] The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons. In addition, the Commission is granting accelerated approval of the proposed rule change, as amended.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Amendment No. 1, which replaced and superseded the original filing in its entirety, made certain additions to the purpose section and minor changes to the text of the proposed rule change.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Amex proposes to amend Exchange Rule 958—ANTE to codify a change to the Exchange's ANTE System to allow specialists and registered options traders (''ROTs'') to establish an options ''Quote Risk Manager.'' The text of the proposed rule change, as amended, is below. Proposed new language is in *italics.*

Rule 958—ANTE Options Transactions of Registered Options Traders

(a)–(h) No Change.

. . . Commentary

.01–.09 No Change.

.10 ANTE Participant Quotations

Automated Quotation Adjustments—An ANTE Participant may establish parameters by which ANTE will automatically restate the prices of ANTE Participant quotations in all series of an options class, at prices specified by the ANTE Participant, if within an Exchange-specified time period such ANTE Participant, in the aggregate, executes a number of trades, specified by the ANTE Participant, for that options class. The threshold number of trades shall be pre-established by the ANTE Participant for each options class.

* * * * *

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it had received on the proposed rule change. The text of these statements may be examined at the places specified in Item III below. The Amex has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Exchange rules require option specialists to continuously provide and maintain a two-sided market of at least ten contracts for every series of every option class they are allocated.[4] Although not required, ROTs often continuously provide and maintain two-sided markets in every series of every option class they are assigned.[5] This continuous quoting obligation can, at times, subject specialists and ROTs to unintended and often unacceptable levels of risk. Each option class has at least twelve (12) series and many option classes have significantly more series.[6]

The Exchange's ANTE System, which provides for the nearly simultaneous execution of orders in these numerous series, subjects specialists and ROTs to executions at their quoted market with little or no ability to adjust the quote in response to the number of contracts traded at a given price, particularly if orders arrive in quick succession from multiple sources in various related option series. Accordingly, specialists and ROTs are vulnerable to the risk that, through an error in their pricing decisions or because of market developments, they will receive multiple executions at disadvantageous prices across all of the related option series in an option class—all before they are able to react and adjust their quotes. As a result, the quality of the markets available to customers may suffer because, under such circumstances, specialists and ROTs are likely to quote less aggressively and limit the size of their quotes to avoid the attendant risks and costs.

In order to protect specialists and ROTs from this unreasonable level of risk of multiple and nearly simultaneous executions in related options series, the Exchange has developed an enhancement to the ANTE System which is referred to as the ''Quote Risk Manager.'' The ''Quote Risk Manager'' would provide the ability for specialists and ROTs to automatically restate their quote to an inferior price (*i.e.*, the widening of quotes).[7] The result of this ''widened quote'' would be to prevent further executions, since in the ANTE System trades are subject to execution at a price no worse than the national best bid or offer.[8]

[4] *See* Exchange Rule 950—ANTE (1).

[5] *See* Exchange Rule 958—ANTE (h)(iii)(A).

[6] For a typical equity option class, the Exchange lists both puts and calls in four expiration months with three strike prices within each expiration month. Many option classes also have puts and calls with numerous strike prices in two long-term expiration series. As the underlying stock price moves, additional strike prices are added for each expiration. Options on volatile stocks can have well over 100 different series trading at any given time. For example, there are over 400 different series traded in Google (GOOG).

[7] Specialists and ROTs may not exceed the legal width requirements as set forth in Exchange Rule 958—ANTE(c).

[8] The Exchange established time period shall initially be five (5) seconds. If the Exchange were to change this time period it would provide notice to the specialists and ROTs.

The Exchange's proposed rule requires that a certain number of trades occur in an options class before the automatic widening of quotes takes place. Proposed Commentary .10 to Rule 958—ANTE provides that a specialist or ROT may establish specific parameters by which their quotations in all series of an options class are automatically repriced. ANTE would widen the quotes at the specialist's or ROT's predetermined price, if the specialist or ROT executes a set number of trades, to be specified by the specialist or ROT, within an Exchange established time frame, in that class.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with Section 6(b) of the Act,[9] in general, and furthers the objectives of Section 6(b)(5) of the Act,[10] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange believes that the proposed rule change would impose no burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received by the Exchange on this proposal.

III. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change, as amended, is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–Amex–2005–131 on the subject line.

Paper Comments

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–9303.

All submissions should refer to File Number SR-Amex-2005–131. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 100 F Street, NE., Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principal office of the Amex. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make publicly available. All submissions should refer to File Number SR–Amex–2005–131 and should be submitted on or before February 16, 2006.

IV. Commission's Findings and Order Granting Accelerated Approval of Proposed Rule Change

After careful review, the Commission finds that the proposed rule change, as amended, is consistent with the requirements of the Act and the rules and regulations thereunder, applicable to a national securities exchange.[11] In particular, the Commission believes that the proposed rule change is consistent with Section 6(b)(5) of the Act,[12] which requires among other things, that the rules of the Exchange are designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. The Commission notes that the proposal does not alter the obligations of specialists and ROTs. The Commission believes that the proposed rule change should provide specialists and ROTs assistance in effectively managing their quotations.

The Amex has requested that the Commission find good cause for approving the proposed rule change prior to the thirtieth day after publication of notice thereof in the **Federal Register**. The Commission notes that similar proposals to provide protection from risk for market makers have been approved for other options exchanges.[13] The Commission believes that granting accelerated approval of the proposal should provide specialists and ROTs with similar protections from the risk associated with an excessive number of near simultaneous executions in a single options class. Accordingly, the Commission finds good cause, pursuant to Section 19(b)(2) of the Act,[14] for approving the proposed rule change, as amended, prior to the thirtieth day after the date of publication of notice thereof in the **Federal Register**.

V. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[15] that the proposed rule change (SR–Amex–2005–131) and Amendment No. 1 thereto be, and hereby are, approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[16]

J. Lynn Taylor,

Assistant Secretary.

[FR Doc. E6–942 Filed 1–25–06; 8:45 am]

BILLING CODE 8010–01–P

[9] 15 U.S.C. 78f(b).

[10] 15 U.S.C. 78f(b)(5).

[11] In approving this proposal, the Commission has considered its impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[12] 15 U.S.C. 78f(b)(5).

[13] *See* Securities Exchange Act Release Nos. 51049 (January 18, 2005), 70 FR 3756 (January 26, 2005) (SR–BSE–2004–52); 51050 (January 18, 2005), 70 FR 3758 (January 26, 2005) (SR–ISE–2004–31); and 51740 (May 25, 2005), 70 FR 32686 (June 3, 2005) (SR–PCX–2005–64).

[14] 15 U.S.C. 78s(b)(2).

[15] 15 U.S.C. 78s(b)(2).

[16] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–53161; File No. SR–Amex–2005–075]

Self-Regulatory Organizations; American Stock Exchange LLC; Notice of Filing of Proposed Rule Change and Amendments No. 1, 2, and 3 Thereto Relating to the Establishment of a New Class of Registered Options Trader Called a Supplemental Registered Options Trader (''SROT'')

January 20, 2006.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on July 14, 2005, the American Stock Exchange LLC (''Amex'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Amex. On November 4, 2005, the Amex filed Amendment No. 1 to the proposed rule change.[3] On December 7, 2005, the Amex filed Amendment No. 2 to the proposed rule change.[4] On January 13, 2006, the Amex filed Amendment No. 3 to the proposed rule change.[5] The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Amex proposes new Amex Rule 993–ANTE and proposes to adopt amendments to existing Amex Rules 900–ANTE, 918–ANTE, 935–ANTE, 936–ANTE, 936C–ANTE, 950–ANTE, 951–ANTE, 958–ANTE and 958A–ANTE to authorize a new category of registered options trader called a Supplemental Registered Options Trader (''SROT'').

The text of the proposed rule change is available on the Amex's Web site at *http://www.amex.com*, at the Amex's principal office, and at the Commission's Public Reference Room.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Amendment No. 1, which replaced and superseded the original filing in its entirety, is incorporated in this notice.

[4] Amendment No. 2, which replaced and superseded the original filing in its entirety, is incorporated in this notice.

[5] Amendment No. 3, which made clarifying changes to the Purpose section, as well as changes to the proposed rule text relating to allocation of executed contracts and affiliation limitations, is incorporated in this notice.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Amex included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Amex has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to create a new category of Registered Options Trader (''ROT'') called an SROT. An SROT is a ROT which would be a member organization so designated by the Exchange which would be granted remote quoting rights to enter bids and offers electronically from off the Exchange's physical trading floor.

The introduction of SROTs combines the electronic and open outcry trading models. Currently, the Exchange permits ROTs to submit quotes only from the physical trading floor. In this regard, the Exchange anticipates that offering the ability to enter offers and bids electronically away from the trading floor will increase the liquidity available in those classes which the SROT is assigned, as well as enhance the overall competitiveness of the Exchange. Rules applicable to ROTs would not apply to SROTs unless otherwise specified. The proposed rules and amendments to current rules discussed below would address the definition, approval process, obligations, and quoting rights of SROTs.

i. *Proposed Rule 993–ANTE.* Proposed new Amex Rule 993–ANTE sets forth the method and the factors to be used in approving SROTs. Under the Exchange's proposal, an SROT would be defined as a ROT that is a member organization that would be granted remote quoting rights to trade in at least 300–400 option classes. A member organization requesting approval to act as an SROT would file an application with the Exchange. The Exchange intends to approve SROTs that demonstrate qualities which would encourage the development of the business of the Exchange. A maximum of six (6) SROTs would initially be chosen based upon the following criteria:

- Adequacy of resources including capital, technology and personnel;
- History of stability, superior electronic capacity, and superior operational capacity;
- Level of market-making and/or specialist experience in a broad array of securities;
- Ability to interact with order flow in all types of markets;
- Existence of order flow commitments;
- Willingness to accept allocations as an SROT in at least 300–400 options; and
- Willingness and ability to make competitive markets on the Exchange and otherwise promote the Exchange in a manner that is likely to enhance the ability of the Exchange to compete successfully for order flow in the options it trades.

The Exchange, through a committee designated by the Exchange's Board of Governors (the ''Committee''), expects to approve SROTs that demonstrate the foregoing criteria. The Committee would include representatives from the Options Market Maker Association and the Options Specialist Association. In approving an applicant as an SROT, the Committee would be permitted to consider a member organization's operations to determine the number of option classes an applicant would be assigned.

The Committee would use the factor relating to the existence of order flow commitments to evaluate existing order flow commitments between an SROT applicant and order flow providers. A future change to, or termination of, any such commitments would not be used by the Exchange at any point in the future to terminate or take remedial action against an SROT. Furthermore, the Committee would not take remedial action solely because orders subject to any such commitments were not subsequently routed to the Exchange.

The final criterion, ''willingness to promote the Exchange,'' would include assisting in meeting and educating market participants, maintaining communications with member firms in order to be responsive to suggestions and complaints, responding to suggestions and complaints, and other similar activities. The Committee would use the final criterion listed to determine which applicants would best be able to enhance the competitiveness of the Exchange. The Committee would not apply this factor to in any way restrict, either directly or indirectly, an SROT's activities as a market maker or specialist on other exchanges, or to

restrict how SROTs handle orders held by them in a fiduciary capacity to which they owe a duty of best execution. The Committee would use its discretion in conjunction with the foregoing factors to determine which SROTs should be initially chosen.

Under the Exchange's proposal, determinations regarding granting or withdrawing approval to act as an SROT would be made by the Committee. Furthermore, the Exchange proposes that an SROT application would not be approved by the Committee without written certification signed by an officer of the Exchange's Technology department indicating that an SROT applicant has sufficient technological ability to support the continuous quoting requirement set forth in 993—ANTE (c) and 958—ANTE (c), and that an SROT applicant has successfully completed, or is scheduled to complete, testing of its quoting system with the Exchange.

The Exchange's proposal further provides that if the Committee decides not to approve the applicant, it would notify the applicant of its denial. The applicant would be entitled to a hearing under Article IV, Section 1(g) of the Amex Constitution and Amex Rule 40.

The Committee would be permitted to defer an SROT applicant that satisfies the technological readiness and testing requirements described in proposed Amex Rule 993—ANTE subparagraph (a)(iv) based on system constraints, capacity restrictions, or other factors to ensure the maintenance of a fair and orderly market, for a period to be determined at the Committee's discretion. The Committee may not defer a determination of the approval of the application of an SROT applicant unless the basis for such deferral has been objectively determined by the Committee, subject to the Commission's approval or effectiveness pursuant to a rule change filing under Section 19(b) of the Act. The Committee would provide written notification to any SROT applicant whose application is the subject of such deferral, describing the objective basis for such deferral.

The Exchange's proposal requires an SROT applicant that seeks to withdraw as such to notify the Exchange at least ten business days prior to the desired effective date of such withdrawal.

The Exchange would also be permitted to suspend or terminate any appointment of an SROT in one or more classes whenever, in the Exchange's judgment, the interests of a fair and orderly market are best served by such action. An SROT would be permitted to seek review of the termination or suspension of its status by the Exchange pursuant to Article IV, Section 1(g) of the Amex Constitution and Amex Rule 40.

The proposal provides that the Exchange would determine the number and type of option classes assigned to an SROT as currently set forth under Commentary .05 of Amex Rule 958—ANTE. Under the proposal, the Exchange would assign a minimum of 300 option classes per SROT.

Under the Exchange's proposal, SROTs would be required to purchase or lease one seat for every thirty (30) option classes quoted. SROTs also would be required to provide continuous two-sided quotations in accordance with the parameters set forth in Amex Rule 958—ANTE (c) in at least 60% of the series of their assigned classes.

The Exchange's proposal requires that, in addition to other obligations, no SROT would be assigned to an options class where the SROT has a direct or indirect affiliate who is a specialist, ROT or SROT in such option class. Additionally, no person who is either directly or indirectly affiliated with an SROT may submit quotations as an SROT, ROT or specialist in options in which the affiliate SROT is assigned. Furthermore, SROTs would maintain information barriers that are reasonably designed to prevent the misuse of material, non-public information with any affiliates that may conduct a brokerage business in option classes assigned to an SROT, or that may act as a market maker in any security underlying options assigned to an SROT. The proposal further requires SROTs to comply with Amex Rule 193 regarding the misuse of material non-public information between the affiliate and the specialist organization. The purpose of this provision is to prevent affiliated parties from quoting electronically in the same option class and receiving multiple automatic allocations for the same or affiliated beneficial account owners.

Under the proposal, quoting rights and designation of an SROT would be non-transferable. An SROT would be permitted to submit electronic quotations only from off the floor of the Exchange. The proposal further provides that an SROT may trade in a market making capacity only in the classes of options in which the SROT is assigned.

ii. 900—ANTE. Amex Rule 900—ANTE currently sets forth the applicability, definitions and references on ANTE. The Exchange proposes to include the definition of an SROT in 900—ANTE. The Exchange defines a ROT as a regular member of the Exchange as defined by Article I, Section 3 of the Amex Constitution, located on the trading floor, who has permission to trade in options for his or her own account in accordance with Amex Rule 958—ANTE. An SROT is defined as a ROT that is a member organization so designated by the Exchange that would be granted remote quoting rights to enter bids and offers electronically from off the Exchange's physical trading floor. Furthermore, SROTs would be subject to the obligations set forth under proposed Amex Rule 993—ANTE. Exchange rules applicable to ROTs would not apply to SROTs unless otherwise specified.

The Exchange also proposes to amend the terms ''Designated Options Area'' and ''Designated Stock Area'' to include only the area of the Exchange's physical trading floor where the option and stock, respectively, of a Paired Security are traded. The term ''ANTE Participant'' also would be amended to include an SROT assigned to trade a specific options class on the ANTE System.

iii. *918—ANTE.* Amex Rule 918—ANTE currently sets forth the automated opening, reopening and closing rotation procedures, trading halts and the supervision of such procedures. The Exchange proposes to amend Commentary .01 to Amex Rule 918—ANTE to include paragraph (c), which provides that SROTs may not submit market orders prior to the opening and that SROTs may submit quotes or limit orders prior to the opening.

iv. *935—ANTE.* Amex Rule 935—ANTE currently provides for the allocation of all contracts executed through the ANTE system. The Exchange proposes to amend Amex Rule 935—ANTE to include SROTs. Under the Exchange's proposal, the ANTE System would allocate executed contracts to non-broker-dealer customers, broker-dealers, competing market makers, specialists, registered options traders and SROTs in accordance with the provisions therein. The Exchange further proposes that when more than one market participant is quoting at the Amex Best Bid and Offer (''ABBO''), and an SROT is not interacting with its own firm's orders, the allocations in the current Amex Rule 935—ANTE (a)(1)–(4) would apply. Proposed paragraph (5) states that when more than one market participant is quoting at the ABBO, and an SROT is interacting with its own firm's orders, the ANTE System would allocate the remaining contracts after non-broker dealer customer orders as follows: (i) 40% to an SROT interacting with its own firm's orders and (ii) the balance to

registered options traders and to the specialist.

v. *936—ANTE and 936C—ANTE.* Amex Rule 936—ANTE and Amex Rule 936C—ANTE govern the cancellation and adjustment of equity options transactions and the cancellation and adjustment of index option transactions, respectively. The Exchange proposes to amend Amex Rule 936—ANTE and Amex Rule 936C—ANTE to include SROTs in the transactions that may be cancelled or adjusted. The proposal further modifies the notification requirement to allow Trading Officials and/or the Obvious Error Panel reviewing the transactions to both orally or electronically notify the members involved in the transaction of their determination. The purpose of the proposed electronic notification requirement is to provide notice to SROTs which are engaging in transactions off the Exchange's physical trading floor.

vi. *950—ANTE.* Amex Rule 950—ANTE (b) currently provides rules for priority and parity at the opening. Paragraph (b)(i) specifically provides that after the opening, an options specialist acting as principal may only retain priority over, or be on parity with, orders for the accounts of broker-dealers, but may not retain priority over, or be on parity with, off-floor orders for the accounts of public customers. The Exchange proposes to amend 950—ANTE (b)(i) to identify SROTs as broker-dealers. Commentary .01 of paragraph (c) currently provides that after the opening, an options specialist acting as principal, may only retain priority over or be on parity with orders for the accounts of broker-dealers but may not retain priority over or be on parity with off-floor orders for the accounts of public customers. Commentary .02 of paragraph (c) provides that options orders for the accounts of broker-dealers may only retain priority over or be on parity with orders for the accounts of broker-dealers but may not retain priority over or be on parity with off-floor orders for the accounts of public customers. The proposed amendments to Commentaries .01 and .02 of paragraph (c) would also categorize an SROT as a broker-dealer. Finally, the proposed amendment to Commentary .02 of paragraph (l) would require SROTs to compete with one another to improve the quoted markets in all series of option classes in which they trade.

vii. *951—ANTE.* Amex Rule 951—ANTE currently governs the bids and offers of options contracts. Commentary .01 to Amex Rule 951—ANTE provides that if the bid or offer of a specialist or registered options trader locks or crosses the ABBO, the ANTE System would revise the bid by one or more minimum price variations lower than the bid submitted, or revise the offer by one or more minimum price variations higher than the offer submitted, so that the bid or offer submitted does not lock or cross the ABBO provided.[6] The Exchange proposes to amend Commentary .01 to Amex Rule 951—ANTE to apply to SROTs.

viii. *958—ANTE.* Amex Rule 958—ANTE governs ANTE options transactions of registered options traders. Pursuant to 958—ANTE (a), registered options traders are assigned classes of options in accordance with the existing procedures set forth in Commentary .05. Amex Rule 958—ANTE (a) also provides that any option transactions initiated by a registered options trader on the Floor and through the facilities of the Exchange for any account in which the registered options trader has an interest would be in such assigned classes. Paragraph (b) of Amex Rule 958—ANTE provides that transactions of a registered options trader must be reasonably calculated to contribute to the maintenance of a fair and orderly market, and no registered options trader should enter into transactions or make bids or offers that are inconsistent with such a course of dealings. Paragraph (c) of Amex Rule 958—ANTE provides that whenever a registered options trader participates in the trading of options in other than a floor brokerage capacity, or is called upon by a floor official or floor broker acting in an agency capacity, they would be required to make competitive bids and offers necessary, in a market making capacity, to contribute to the maintenance of a fair and orderly market. The Exchange proposes to apply paragraphs (a), (b) and (c) of 958—ANTE to SROTs as they currently apply to registered options traders.

Paragraph (h) currently provides that registered options traders may choose to use an Exchange provided or proprietary automated quote system to calculate and disseminate quotes, or join the specialist's disseminated quotation in some or all of his assigned classes or series. Paragraph (h) further provides that registered options traders must be physically present at the specialist's post on the floor of the Exchange where that options class is traded.

Under the Exchange's proposal, SROTs would not be permitted to use the ''join quote'' feature in ANTE. The Exchange believes that requiring SROTs to submit their own quotes in options that an SROT is assigned would serve to further foster active quote competition. Finally, the Exchange proposes that SROTs, as well as registered options traders and specialists, must compete with each other to improve the quoted markets in all series of option classes which they trade. The Exchange further proposes to amend its original filing to remove the in-person requirement for SROTs as provided in paragraph (h) because they would not be physically present.

ix. *958A—ANTE.* Amex Rule 958A—ANTE, the Exchange's Firm Quote Rule, currently provides that registered options traders, when inputting their own quotes through an Exchange provided or proprietary automated quote calculation system, would each be considered a responsible broker or dealer for their bids or offers to the extent of their quotation size. The Exchange proposes to amend Amex Rule 958A—ANTE (a)(ii)(C) to include SROTs as responsible broker-dealers to the extent of their quotation size for the purposes of this rule.

2. Statutory Basis

The Exchange believes that the proposed rule change, as amended, is consistent with Section 6(b) of the Act,[7] in general, and furthers the objectives of Section 6(b)(5) of the Act,[8] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principals of trade, and, in general, to protect investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange believes that the proposed rule change will impose no burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

No written comments were solicited or received by the Exchange on this proposal.

[6] The ANTE System collects all of the quotes being calculated by the specialist and each registered options trader, and determines the best bid and best offer for dissemination pursuant to the firm quote rule, as the ABBO. The ANTE System never allows a locked or crossed market to occur in the ABBO. If a quote is submitted that would lock or cross the ABBO, the ANTE System will revise the bid or the offer by the minimum price variant(s) so that the ABBO is not locked or crossed.

[7] 15 U.S.C. 78f(b).

[8] 15 U.S.C. 78f(b)(5).

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission will:

(A) By order approve such proposed rule change, as amended, or

(B) institute proceedings to determine whether the proposed rule change, as amended, should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change, as amended, is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–Amex–2005–075 on the subject line.

Paper Comments

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, Station Place, 100 F Street, NE., Washington, DC 20549–9303.

All submissions should refer to File Number SR–Amex–2005–075. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, Station Place, 100 F Street, NE., Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principal office of the Amex. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–Amex–2005–075 and should be submitted on or before February 16, 2006.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[9]

J. Lynn Taylor,

Assistant Secretary.

[FR Doc. E6–968 Filed 1–25–06; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–53092A; File No. SR–CBOE–2005–105]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing of Proposed Rule Change Relating to the CBOE's Membership Rules for Foreign Member Organizations

January 19, 2006.

Correction

FR Doc. E6–465, issued on January 18, 2006 on page 2963, regarding Securities Exchange Act Release No. 53092, incorrectly cited the date of the notice as January 10, 2005. The date should read January 10, 2006.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[1]

J. Lynn Taylor,

Assistant Secretary.

[FR Doc. E6–966 Filed 1–25–06; 8:45 am]

BILLING CODE 8010–01–P

[9] 17 CFR 200.30–3(a)(12).

[1] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–53152; File No. SR–NYSE–2005–75]

Self-Regulatory Organizations; New York Stock Exchange, Inc.; Order Granting Approval to a Proposed Rule Change Relating to Section 802.01E of the Listed Company Manual Concerning Continued Listing of Companies That Fail to File Their Securities Exchange Act of 1934 Annual Reports in a Timely Manner

January 19, 2006.

I. Introduction

On October 26, 2005, the New York Stock Exchange, Inc. (''NYSE'' or ''Exchange'') submitted to the Securities and Exchange Commission (''Commission'' or ''SEC''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] a proposed rule change relating to amendments to the Listed Company Manual procedures applicable to companies that fail to file in a timely manner their annual report required by the Act. The proposed rule change was published for public comment in the **Federal Register** on November 16, 2005.[3] The Commission received four comments regarding the proposed rule change.[4] On December 14, 2005, the Exchange submitted a response to the comments.[5] This order approves the proposed rule change.

II. Description of the Proposed Rule Change

The Exchange recently amended Section 802.01E of the NYSE's Listed Company Manual, which codifies the Exchange's procedures relating to situations where companies fail to satisfy the Commission's filing requirements for annual reports on Forms 10–K, 10–KSB, 20–F, 40–F, or N-CSR in a timely manner.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 52760 (November 10, 2005), 70 FR 69617.

[4] *See* comments from James J. Angel (''Angel''), Associate Professor of Finance, McDonough School of Business, Georgetown University, dated December 5, 2005 (''Angel Letter''); Steve Berman (''Berman''), SRIC-Atlantic Trust, dated December 6, 2005 (''Berman Letter''); Edward S. Knight, Executive Vice President and General Counsel, The Nasdaq Stock Market, Inc. (''Nasdaq''), dated December 7, 2005 (''Nasdaq Letter''); and Mark Patterson (''Patterson''), Managing Director, NWQ Investment Management, LLC, dated December 7, 2005 (''Patterson Letter'').

[5] *See* letter from Mary Yaeger, Assistant Secretary, NYSE, to Jonathan G. Katz, Secretary, Commission, dated December 14, 2005 (''NYSE Response Letter'').

Section 802.01E currently provides that if a company fails to timely file an annual report with the SEC, the Exchange will monitor the company and the status of the filing. If the company fails to file the annual report within nine months from the filing due date, the Exchange may, in its sole discretion, allow the company's securities to be traded for up to an additional three-month trading period depending on the company's specific circumstances.[6] If the company does not file its annual report by the end of the nine-month or 12-month period, as applicable, the Exchange will begin suspension and delisting procedures in accordance with the procedures in Section 804.00.

The Exchange believes that there are very rare circumstances involving listed companies that have a position in the market (relating to both the nature of their business and their very large publicly-held market capitalization) such that their delisting from the Exchange would be significantly contrary to the national interest and the interests of public investors, notwithstanding a delay in an annual report filing that extended beyond one year.

The Exchange has proposed to amend Section 802.01E to provide that, in these very rare circumstances, a listed company may remain suitable for listing given: (1) Its continuing compliance with the NYSE's quantitative and qualitative listing standards; (2) its continued ability to meet certain debt obligations and adequately finance operations; (3) its progress, as reported to the Exchange, in completing its financial statements; (4) its public transparency on its status, issuing press releases regarding its progress in completing its financial statements and providing other information regarding its financial status; and (5) the reasonable expectation that the company will be able to resume timely filings in the future. In these circumstances, the Exchange may forebear from commencing suspension and delisting proceedings notwithstanding the listed company's failure to file the annual report within the time periods specified in Section 802.01E. Under the proposal, the Exchange must advise the SEC of, and publish on the NYSE's Web site, any such determination. In addition, the Exchange will reevaluate such determination once every three months and, if the Exchange reaffirms its decision to allow trading to continue, the Exchange must advise the SEC of, and publish on the NYSE's Web site, that reaffirmation.

In all such cases, the NYSE has represented that Exchange staff will continue to hold regular discussions and meetings with the company's management, directors, regulators, and advisors to monitor the status of the annual report filing, as well as the company's compliance with the NYSE's other qualitative and quantitative requirements, and to determine whether to allow the company to continue to trade despite the continued failure to file an annual report with the SEC. In addition, in order to provide investors with appropriate notice that companies have failed to file their annual reports with the SEC in a timely manner, the Exchange will continue to monitor and disseminate information on the failure of such companies to file their annual report with the SEC, including through appending an ''.LF'' indicator in the financial status field of the company's ticker symbol and distributing that information via the low speed ticker and through the data stream to market data vendors.[7]

With respect to all companies subject to Section 802.01E, the Exchange is also proposing to (1) shorten the initial monitoring period for companies that miss their filing due date from nine months to six months and (2) lengthen from three months to six months the additional period that the Exchange may grant companies prior to the commencement of suspension and delisting procedures. In addition, the Exchange is proposing minor amendments to Section 802.01E to clarify the type of information that must be included in the press release to be issued when the company is late in filing its annual report. Specifically, in addition to the status of the filing, the press release must note the delay and the reasons for it, as well as the anticipated filing date, if known. The proposal also makes some non-substantive clarifying changes to the rule language.

[6] In determining whether an additional three-month trading period is appropriate, the Exchange considers the likelihood that the filing can be made during the additional three month period, as well as the company's general financial status based on information provided by a variety of sources, including the company, its audit committee, its outside auditors, the staff of the Commission, and any other regulatory body.

[7] The NYSE represented that it maintains an up-to-date list of companies that are late in filing their annual reports with the SEC on its Web site at *www.nyse.com.* Additionally, the NYSE represented that each listed company has a unique data page on the site and, when applicable, this page indicates that the company is considered a late filer.

III. Comments

The Commission received four comments on the proposal.[8] Three commenters supported the proposal;[9] one commenter opposed the proposal.[10] Angel stated that the proposal seemed reasonable and should be approved. In his letter, however, he states that the markets should adopt a uniform method of alerting investors of issuers that are late in filing their annual reports, and expresses concern that common financial portals do not carry late filer identifiers appended by the markets. Patterson stated that he believed the proposal ''sets forth reasonable and workable guidelines regarding the evaluation and execution of the delisting process.'' Berman stated that ''[c]ompanies with strong financials, but for certain circumstances are involved in a lengthy historical restatement and re-audit process to comply with GAAP can be unfairly penalized by this existing rule as presently stated.'' The Berman Letter supports allowing some discretion under certain circumstances in the current delisting standard for late filers, noting that a hard and fast rule has the potential to cause short-term volatility that may be especially harmful to individual investors.

Nasdaq believes that the Commission should reject the proposed rule change, arguing that it is ''antithetical'' to Section 6(b)(5) of the Act,[11] which requires that the rules of the NYSE be designed to protect investors and the public interest and not be designed to permit unfair discrimination between issuers. According to Nasdaq, the NYSE proposal would allow certain issuers to trade indefinitely without publicly available audited financial statements and without the required disclosures.[12] Nasdaq believes that ''the availability and integrity of financial statements is an issue that cuts across all markets and raises fundamental issues of investor protection.'' Furthermore, the proposed rule change would be available only to a company having a position in the market such that its delisiting would be significantly contrary to the national interest and the interests of public investors, due to the nature of its business and its ''very large'' publicly-held market capitalization. According to

[8] *See supra* note 4.

[9] *See* Angel Letter; Berman Letter; and Patterson Letter.

[10] *See* Nasdaq Letter.

[11] 15 U.S.C. 78f(b)(5).

[12] Nasdaq stated that, rather than shortening the total timeframe within which a company must file annual reports before being delisted, a goal articulated by the Commission in the order approving Section 802.01E, the NYSE's proposal would extend that timeframe.

Nasdaq, not only are these criteria subjective, the NYSE does not specifically explain how these criteria ''justify allowing an issuer to continue to trade when that issuer has been unable to provide required audited financial statements and disclosures to investors for a period longer than one year.'' Nasdaq further states that allowing such a company to continue to trade for an extended period of time ignores the emphasis the Commission has placed on prospective investors, who have a right to assume that companies meet listing requirements.

The NYSE responded to Nasdaq's concerns by stating that it ''does not agree that the proposed rule change is contrary to the interests of investors, as there will be significant protections for investors built into its application.'' [13] The NYSE pointed out specifically that the provision will apply only ''in circumstances where Exchange staff have determined that a company remains suitable for listing given its relative financial health and compliance with the NYSE's quantitative and qualitative listing standards and that there is a reasonable expectation that the company will be able to resume timely filings in the future.'' According to the NYSE, the proposal protects investors ''by requiring the Exchange to take into consideration the relative transparency of the company's public disclosures relating to the status of its completion of its filing and its provision of other information regarding its financial status.'' The NYSE also noted its obligation to reconsider extensions every three months, to monitor the company's progress in compliance efforts, and to identify late filers by means of an ''LF'' appendage to the company's ticker symbol and Web site disclosure.

The NYSE does not agree that the proposed rule is ''antithetical'' to Section 6(b)(5) of the Act for unfairly discriminating among issuers. The NYSE stated that the motivation for the rule is that ''the effective functioning of certain companies is of particular importance to the national interest and that a disruption in the orderly market for their securities would have serious implications not just for those companies and their shareholders but also for the country as a whole.'' The NYSE asserts that the ''effect on the national interest'' and not merely the size of an issuer will be considered in determining whether to grant an exception.

[13] *See* NYSE Response Letter.

IV. Discussion

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange. In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act, which requires an Exchange to have rules that are designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest; and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.[14]

Although the Commission believes that the goal of ensuring that listed companies have filed accurate, up-to-date annual reports under the Act is of critical importance, the Commission recognizes that there may be certain very rare circumstances under which the new NYSE delisting requirements could be too inflexible. In this regard, the Commission believes that the proposed rule change provides the Exchange with appropriately limited flexibility to allow a company that is more than 12 months late in filing its annual report with the Commission to remain listed on the NYSE. This limited discretion is available only in certain very rare circumstances where the company has a position in the market such that its delisiting would be significantly contrary to the national interest and the interests of public investors, due to the nature of its business and its very large publicly-held market capitalization.

The Commission notes that the proposal has provisions that help to assure the availability to investors of information on which to base trading decisions, even in the absence of formal SEC filings. For instance, before the NYSE could grant an extension beyond 12 months, the proposal would require it to consider whether the company has been publicly transparent on its status, issuing press releases regarding its progress in completing its financial statements and providing other information regarding its financial status. In addition, the NYSE also must consider the issuer's continuing compliance with applicable quantitative and qualitative listing standards, its continued ability to meet current debt obligations and adequately finance operations, its progress in completing its financial statements, and whether there is a reasonable expectation the issuer will be able to resume timely filings in the future.

The Commission emphasizes that the new standards apply only in certain very rare circumstances where the Exchange determines that delisting of the late filer would be contrary to the national interest and the interests of public investors, due to the late filer's position in the market (*i.e.*, the nature of its business and its very large publicly-held market capitalization). As the NYSE noted in the NYSE Response Letter, the standard is meant to apply only to those companies where a ''disruption in the orderly market for their securities would have serious implications not just for those companies and their shareholders but also for the country as a whole.'' While the Commission clearly believes that information in the annual report required under the Act is critical to investors and our national markets, we believe that, under these circumstances, and subject to the conditions in the proposed rule change, some limited flexibility to allow a company to remain listed is appropriate.

The Commission also notes the Exchange must advise the Commission of, and publish on the NYSE's Web site, any determination to allow a company that is more than 12 months late in filing its annual report with the Commission to remain listed on the NYSE.[15] In addition, the Exchange will reevaluate such determination once every three months and, if the Exchange reaffirms its decision to allow trading to continue, the Exchange will advise the SEC of, and publish on the NYSE's Web site, that reaffirmation.[16] The NYSE rules also make clear that, regardless of the procedures for continued listing of a late annual report filer under Section 802.01E of the Listed Company Manual, if at any time the Exchange believes it

[14] In approving the proposed rule change, the Commission has considered its impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[15] As discussed above, the NYSE will continue to identify late filers by means of an ''LF'' appendage to the company's ticker symbol. The Commission continues to urge the NYSE to encourage data vendors and subscribers to display the indicator.

[16] As noted above, the NYSE states, among other things, that it will continue to hold regular discussions and meetings with the company's management, directors, regulators and advisors to monitor the status of the annual report filing and compliance with other listing standards, and to determine if continued trading should be permitted despite the failure of the company to file its annual report with the Commission. The Commission notes that despite the formal reaffirmation required under the rule every three months and the public announcement of such decision, the Commission expects the monitoring of such companies to take place on an on-going basis throughout the extended continued trading period.

is necessary in the public interest or for the protection of investors, it can suspend trading immediately in any security and commence delisting under Section 804.00 of the NYSE's Listed Company Manual. Indeed, the Commission expects the NYSE to suspend trading quickly and commence delisting proceedings immediately against any late filer continuing to trade under these new provisions should it be necessary to do so based on the facts of the particular situation. The Commission intends to monitor the NYSE's use of the proposed exception to its delisting requirement to ensure that such use is in compliance with the procedures and safeguards set forth in this filing.

Finally, the Commission notes that Section 802.01E of the Exchange's Listed Company Manual currently requires the delisting of the securities of any company that is nine months late in filing its annual report on Form 10–K, unless the Exchange determines that an additional three months is appropriate. The Commission believes that changing the initial time frame that a late filer has to be delisted under the rule from nine months to six months is an improvement. However, because in conjunction with this change, the NYSE is proposing to lengthen the additional period the Exchange can allow a late filer to continue to trade from three months to six months, the total specified time periods under the rule for late filers remains 12 months. While the change will have companies reevaluated more quickly for delisting with no assurance the additional six months will be granted, the Commission continues to believe that the NYSE should consider shortening the total timeframes specified under Rule 802.01E for delisting a late filer, as well as extending such requirements to issuers that are late in filing their quarterly reports with the Commission.[17]

V. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[18] that the proposed rule change (SR–NYSE–2005–75) is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[19]

J. Lynn Taylor,

Assistant Secretary.

[FR Doc. 06–769 Filed 1–25–06; 8:45 am]

BILLING CODE 8010–01–P

DEPARTMENT OF STATE

[Public Notice 5283]

Culturally Significant Objects Imported for Exhibition Determinations: ''Amorous Intrigues and Painterly Refinement: The Art of Frans van Mieris''

SUMMARY: Notice is hereby given of the following determinations: Pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985; 22 U.S.C. 2459), Executive Order 12047 of March 27, 1978, the Foreign Affairs Reform and Restructuring Act of 1998 (112 Stat. 2681, *et seq.*; 22 U.S.C. 6501 note, *et seq.*), Delegation of Authority No. 234 of October 1, 1999, Delegation of Authority No. 236 of October 19, 1999, as amended, and Delegation of Authority No. 257 of April 15, 2003 [68 FR 19875], I hereby determine that the objects to be included in the exhibition ''Amorous Intrigues and Painterly Refinement: The Art of Frans van Mieris,'' imported from abroad for temporary exhibition within the United States, are of cultural significance. The objects are imported pursuant to loan agreements with the foreign owners. I also determine that the exhibition or display of the exhibit objects at The National Gallery of Art, from on or about February 26, 2006, until on or about May 21, 2006, and at possible additional venues yet to be determined, is in the national interest. Public Notice of these Determinations is ordered to be published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: For further information, including a list of the exhibit objects, contact Carol B. Epstein, Attorney-Adviser, Office of the Legal Adviser, U.S. Department of State (telephone: 202/453–8048). The address is U.S. Department of State, SA–44, 301 4th Street, SW., Room 700, Washington, DC 20547–0001.

Dated: January 18, 2006.

C. Miller Crouch,

Principal Deputy Assistant Secretary for Educational and Cultural Affairs, Department of State.

[FR Doc. E6–976 Filed 1–25–06; 8:45 am]

BILLING CODE 4710–05–P

DEPARTMENT OF STATE

[Public Notice 5282]

Department of State Performance Review Board Members (for Non Career Senior Executive Employees)

In accordance with section 4314 (c) (4) of the Civil Service Reform Act of 1978 (Pub. L. 95–454), the Executive Resources Board of the Department of State has appointed the following individuals to the Department of State Performance Review Board (for Non Career Senior Executive Employees).

Kara G. Licalsi, Under Secretary for Management, White House Liaison, Department of State;

Mary Kathleen Lang, Under Secretary for Management, White House Liaison, Department of State;

Brian F. Gunderson, Chief of Staff, Office of the Secretary, Department of State.

Dated: January 17, 2006.

W. Robert Pearson,

Director General of the Foreign Service and Director of Human Resources, Department of State.

[FR Doc. E6–991 Filed 1–25–06; 8:45 am]

BILLING CODE 4710–15–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Policy Statement Number PS–ACE100–2005–50001]

Applying Advisory Circular 20–152, ''RTCA, Inc., Document RTCA/DO–254, Design Assurance Guidance for Airborne Electronic Hardware,'' to Title 14 Code of Federal Regulations, Part 23 Aircraft

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of availability; request for comments.

SUMMARY: This notice announces a Federal Aviation Administration (FAA) proposed policy. This memorandum sets up Federal Aviation Administration (FAA) certification policy on applying Advisory Circular (AC) 20–152 to complex airborne electronic hardware (CEH) installed in part 23 aircraft or in airships. The specific issues addressed concern selecting and applying hardware design assurance levels (HDAL) to CEH. This notice advises the public, especially manufacturers of normal, utility, and acrobatic category airplanes, and commuter category airplanes and their suppliers, that the FAA intends to adopt this policy. This

[17] In considering shortening the time periods, the NYSE may want to assess whether the shortened initial six month period for delisting has had any noticeable impact on when later filers actually submit up-to-date annual reports.

[18] 15 U.S.C. 78s(b)(2).

[19] 17 CFR 200.30–3(a)(12).

notice is necessary to advise the public of this FAA policy and give all interested persons an opportunity to present their views on it.

DATES: Comments must be received on or before February 27, 2006.

ADDRESSES: Send all comments on the proposed policy statement to the individual identified under **FOR FURTHER INFORMATION CONTACT**. Comments may be inspected at the Small Airplane Directorate, Standards Office (ACE–110), Aircraft Certification Service, Federal Aviation Administration, 901 Locust, Room 301, Kansas City, Missouri, between the hours of 7:30 a.m. and 4:00 p.m. weekdays, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Robin Sova, Federal Aviation Administration, Small Airplane Directorate, Regulations & Policy, ACE–114, 901 Locust Street, Room 301, Kansas City, Missouri 64106; telephone: (816) 329–4133; fax: 816–329–4090; e-mail: *robin.sova@faa.gov*.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested persons are invited to comment on this proposed policy statement by submitting written data, views, or arguments. Identify the proposed policy statement number, PS–ACE100–2005–50001, on your comments. If you submit your comments in writing, send two copies of your comments to the above address. The Small Airplane Directorate will consider all communications received on or before the closing date for comments. We may change the proposal contained in the policy because of the comments received.

Comments sent by fax or the Internet must contain ''Comments to proposed policy statement PS–ACE100–2005–50001'' in the subject line. You do not need to send two copies if you fax your comments or send them through the Internet. If you send comments over the Internet as an attached electronic file, format it in Microsoft Word for Windows. State what specific change you are seeking to the proposed policy memorandum and include justification (for example, reasons or data) for each request.

Copies of the proposed policy statement, PS–ACE100–2005–50001, may be requested from the following: Small Airplane Directorate, Standards Office (ACE–110), Aircraft Certification Service, Federal Aviation Administration, 901 Locust Street, Room 301, Kansas City, MO 64106. In a few days, the proposed policy statement will also be available on the Internet at the following address: *http://www.airweb.faa.gov/policy*.

Issued in Kansas City, Missouri, on January 6, 2006.

John R. Colomy,

Acting Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. E6–962 Filed 1–25–06; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Public Notice for a Change in Use of Aeronautical Property at Manchester Airport, Manchester, NH

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Request for public comments.

SUMMARY: The FAA is requesting public comment on the City of Manchester, New Hampshire's request to change a portion (1 acre) of Airport property from aeronautical use to non-aeronautical use. The property is located off Harvey Road and Planeview Drive, Londonderry, New Hampshire, Identified as Tax Map 14/Lot17–2 and is currently vacant. Upon disposition is the property will be used for industrial development. The property was acquired under FAAP Project No. 9–27–018–C605.

The disposition of proceeds from the disposal of airport property will be in accordance with FAA's Policy and Procedures Concerning the Use of Airport Revenue, published in the **Federal Register** on February 16, 1999.

DATES: Comments must be received on or before February 27, 2006.

ADDRESSES: Documents are available for review by appointment by contacting Mr. David Bush, Assistant Airport Director, Manchester Airport, One Airport Road, Manchester, New Hampshire, Telephone 603–624–6539 or by contacting Donna R. Witte, Federal Aviation Administration, 16 New England Executive Park, Burlington, Massachusetts, Telephone 781–238–7624.

FOR FURTHER INFORMATION CONTACT: Donna R. Witte at the Federal Aviation Administration, 12 New England Executive Park, Burlington, Massachusetts 01803, Telephone 781–238–7624.

SUPPLEMENTARY INFORMATION: Section 125 of The Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21) requires the FAA to provide an opportunity for pubic notice and comment to the ''waiver'' or ''modification'' of a sponsor's Federal obligation to use certain airport property for aeronautical purposes.

Issued in Burlington, Massachusetts on January 12, 2006.

LaVerne F. Reid,

Manager, Airports Division, New England Region.

[FR Doc. 06–724 Filed 1–25–06; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Proposed Technical Standard Order (TSO)–C176, Aircraft Image Recorder Systems

AGENCY: Federal Aviation Administration (DOT).

ACTION: Notice of availability and request for public comment.

SUMMARY: This notice announces the availability of, and requests comments on a proposed Technical Standard Order (TSO) C–176, Aircraft Image Recorder Systems. This proposed TSO tells persons seeking a TSO authorization or letter or design approval what minimum performance standards (MPS) their aircraft image recorder system (AIRS) must meet. In it, we (the Federal Aviation Administration, or FAA) tell you what minimum performance standard (MPS) your AIRS must first meet for approval and identification with the applicable TSO marking.

DATES: Comments must be received on or before February 27, 2006.

ADDRESSES: Send all comments on the proposed technical standard order to: Federal Aviation Administration (FAA), Aircraft Certification Service, Aircraft Engineering Division, Avionic Systems Branch, AIR–130, 470 L'Enfant Plaza, SW., Suite 4102, Washington, DC 20024. Attn: Mrs. Veronica Gardner. Or deliver comments to: Federal Aviation Administration, Suite 4102, 470 L'Enfant Plaza, SW., Washington, DC 20024.

FOR FURTHER INFORMATION CONTACT: Mrs. Veronica Gardner, AIR–130, Suite 4102, Federal Aviation Administration, Aircraft Certification Service, Aircraft Engineering Division, 470 L'Enfant Plaza, SW., Washington, DC 20024. Telephone (202) 385–4690, FAX: (202) 202–5340. Or, via e-mail at: *veronica.gardner@faa.gov*.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested persons are invited to comment on the proposed TSO listed in this notice by submitting such written data, views, or arguments as they desire to the above specified address. Comments received on the proposed TSO may be examined, before and after the comment closing date, in Room 815, FAA Headquarters Building, 800 Independence Avenue, SW., Washington, DC 20591, weekdays except Federal holidays, between 8:30 a.m. and 4:30 p.m. All communications received on or before the closing date will be considered by the Director of the Aircraft Certification Service before issuing the final TSO.

Background

The National Transportation Safety Board (NTSB) determined the probable cause of a recent aircraft accident to be pilot error, stating that the events that led to the accident were difficult for investigators to determine because of limited data. As a result of the limited data available to provide a more definitive cause of the accident, the NTSB recommended among other things, that the Federal Aviation Administration incorporate the European Organization for Civil Aviation Equipment's proposed standards for a crash-protective video recording system into a TSO. We concurred with the NTSB's recommendation, by offering proposed TSO–C176 for a crash-protective video recording system.

How to Obtain Copies

You may get a copy of the proposed TSO–C26d from the Internet at: *http://www.faa.gov/aircraft/draft_docs/*. See section entitled **FOR FURTHER INFORMATION CONTACT** for the complete address if requesting a copy by mail. Copies of SAE ARP5381 may be purchased from the Society of Automotive Engineers, Inc., Department 331, 400 Commonwealth Drive, Warrendale, PA 15096–0001. Copies can also be obtained through the SAE Internet Web site at *http://www.sae.org*.

Issued in Washington, DC, on January 20, 2006.

Susan J.M. Cabler,

Assistant Manager, Aircraft Engineering Division, Aircraft Certification Service.

[FR Doc. 06–723 Filed 1–25–06; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA 2005–23171; Notice 2]

Bridgestone Firestone North America Tire, LLC, Grant of Petition for Decision of Inconsequential Noncompliance

Bridgestone Firestone North America Tire, LLC (Bridgestone Firestone) has determined that certain tires that it produced in 2005 do not comply with S4.3.2 of 49 CFR 571.109, Federal Motor Vehicle Safety Standard (FMVSS) No. 109, ''New pneumatic tires.'' Pursuant to 49 U.S.C. 30118(d) and 30120(h), Bridgestone Firestone has petitioned for a determination that this noncompliance is inconsequential to motor vehicle safety and has filed an appropriate report pursuant to 49 CFR Part 573, ''Defect and Noncompliance Reports.'' Notice of receipt of a petition was published, with a 30-day comment period, on December 9, 2005 in the **Federal Register** (70 FR 73323). NHTSA received no comments.

Affected are a total of approximately 50 P205/70R15 Le Mans Champion SE tires produced in 2005. S4.3.2 of FMVSS No. 109 refers to 49 CFR Part 575.4, section (d) of which requires that the sidewall stamping include the date of manufacture. The noncompliant tires are stamped HYMOLCM, while the correct stamping including the date of manufacture should be HYMOLCM2705.

Bridgestone Firestone believes that the noncompliance is inconsequential to motor vehicle safety and that no corrective action is warranted. Bridgestone Firestone states that ''[t]he noncompliant tires meet or exceed all performance requirements of FMVSS No. 109 and will have no impact on the operational performance or safety of vehicles on which these tires are mounted.'' The petitioner further states,

> The week and year of [the] production portion of the Tire Identification Number (TIN) becomes important in the event of a safety campaign so that the consumer may properly identify the recalled tire(s). For this mislabeling, any safety campaign communication, if necessary, could include in the listing of recalled TINs and (sic) the TIN for these tires with the missing or blank date of production so that the consumer would know that these mislabeled tires are included in the recall.

NHTSA agrees with Bridgestone Firestone that the noncompliance is inconsequential to motor vehicle safety. As Bridgestone Firestone points out, a consumer notification of a recall of the tires could be accomplished by referring to the TIN. Bridgestone Firestone has corrected the problem.

In consideration of the foregoing, NHTSA has decided that the petitioner has met its burden of persuasion that the noncompliance described is inconsequential to motor vehicle safety. Accordingly, Bridgestone Firestone's petition is granted and the petitioner is exempted from the obligation of providing notification of, and a remedy for, the noncompliance.

Authority: (49 U.S.C. 30118, 30120; delegations of authority at CFR 1.50 and 501.8)

Issued on: January 20, 2006.

Daniel C. Smith,

Associate Administrator for Enforcement.

[FR Doc. E6–958 Filed 1–25–06; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA 2005–23169; Notice 2]

Cooper Tire & Rubber Company, Grant of Petition for Decision of Inconsequential Noncompliance

Cooper Tire & Rubber Company (Cooper) has determined that certain tires that it produced in 2005 do not comply with S4.3(a) of 49 CFR 571.109, Federal Motor Vehicle Safety Standard (FMVSS) No. 109, ''New Pneumatic Tires'' and with 49 CFR Part 574.5, ''Tire Identification Requirements.'' Pursuant to 49 U.S.C. 30118(d) and 30120(h), Cooper has petitioned for a determination that this noncompliance is inconsequential to motor vehicle safety and has filed an appropriate report pursuant to 49 CFR Part 573, ''Defect and Noncompliance Reports.'' Notice of receipt of a petition was published, with a 30-day comment period, on December 9, 2005 in the Federal Register (70 FR 73324). NHTSA received no comments.

Affected are a total of approximately 668 size 235/70R15 tires produced during the period January 9, 2005 through June 18, 2005. S4.3(a) and Part 574.5(b) require a tire identification number (TIN) on the tire which includes a size designation. The noncompliant tires were molded with the letters ''4E'' as the size designation. The correct stamping should have been ''TY.''

Cooper believes that the noncompliance is inconsequential to motor vehicle safety and that no corrective action is warranted. Cooper states that the purpose of the TIN is to

facilitate notifying consumers in the event of a recall. Cooper says that if it was required to notify purchasers, ''the subject tires could be easily identified.''Cooper points out that the correct tire size is stamped on the sidewall, and the tires meet all other requirements of FMVSS No. 109 and 49 CFR 574.5.

NHTSA agrees with Cooper that the noncompliance is inconsequential to motor vehicle safety. As Cooper points out, the tires do not have sidewall markings which provide the correct size for the user of this information. In addition, the incorrect marking does not affect the ability to identify the tires in the event of recall. Cooper has corrected the problem.

In consideration of the foregoing, NHTSA has decided that the petitioner has met its burden of persuasion that the noncompliance described is inconsequential to motor vehicle safety. Accordingly, Cooper's petition is granted and the petitioner is exempted from the obligation of providing notification of, and a remedy for, the noncompliance.

(Authority: 49 U.S.C. 30118, 30120; delegations of authority at CFR 1.50 and 501.8)

Issued on January 20, 2006.

Daniel C. Smith,

Associate Administrator for Enforcement.

[FR Doc. 06–731 Filed 1–25–06; 8:45 am]

BILLING CODE 4910–59–M

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA 2005–23168; Notice 2]

Cooper Tire & Rubber Company, Grant of Petition for Decision of Inconsequential Noncompliance

Cooper Tire & Rubber Company (Cooper) has determined that certain tires that it produced in 2005 do not comply with S4.3(a) of 49 CFR 571.109, Federal Motor Vehicle Safety Standard (FMVSS) No. 109, ''New pneumatic tires'' and with 49 CFR 574.5, ''Tire Identification Requirements.'' Pursuant to 49 U.S.C. 30118(d) and 30120(h), Cooper has petitioned for a determination that this noncompliance is inconsequential to motor vehicle safety and has filed an appropriate report pursuant to 49 CFR part 573, ''Defect and Noncompliance Reports.'' Notice of receipt of a petition was published, with a 30-day comment period, on December 9, 2005 in the **Federal Register** (70 FR 73324). NHTSA received no comments.

Affected are a total of approximately 488 size 225/70R15 tires produced during the period January 30, 2005 through April 16, 2005. S4.3(a) and Part 574.5(b) require a tire identification number (TIN) on the tire which includes a size designation. The noncompliant tires were molded with the letters ''X5'' as the size designation. The correct stamping should have been ''35.''

Cooper believes that the noncompliance is inconsequential to motor vehicle safety and that no corrective action is warranted. Cooper states that the purpose of the tire identification number is to facilitate notifying consumers in the event of a recall. Cooper says that if it was required to notify purchasers, ''the subject tires could be easily identified.'' Cooper points out that the correct tire size appears elsewhere on the tire, including twice on each sidewall, and the tires meet all other requirements of FMVSS No. 109 and 49 CFR 574.5.

NHTSA agrees with Cooper that the noncompliance is inconsequential to motor vehicle safety. As Cooper points out, the tires do have sidewall markings which provide the correct size for the user of this information. In addition, the incorrect marking does not affect the ability to identify the tires in the event of recall. Cooper has corrected the problem.

In consideration of the foregoing, NHTSA has decided that the petitioner has met its burden of persuasion that the noncompliance described is inconsequential to motor vehicle safety. Accordingly, Cooper's petition is granted and the petitioner is exempted from the obligation of providing notification of, and a remedy for, the noncompliance.

Authority: (49 U.S.C. 30118, 30120; delegations of authority at CFR 1.50 and 501.8)

Issued on: January 20, 2006.

Daniel C. Smith,

Associate Administrator for Enforcement.

[FR Doc. E6–959 Filed 1–25–06; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Docket No. AB–6 (Sub-No. 432X)]

BNSF Railway Company—Abandonment Exemption—in Walsh County, ND

BNSF Railway Company (BNSF) has filed a notice of exemption under 49 CFR part 1152 subpart F—*Exempt Abandonments* to abandon a 7.12-mile line of railroad between milepost 144.21 at Grafton, and milepost 137.09, near Voss, in Walsh County, ND. The line traverses United States Postal Service Zip Codes 58237 and 58261.

BNSF has certified that: (1) No local traffic has moved over the line for at least 2 years; (2) there is no overhead traffic on the line that would have to be rerouted; (3) no formal complaint filed by a user of rail service on the line (or by a state or local government entity acting on behalf of such user) regarding cessation of service over the line either is pending with the Surface Transportation Board or with any U.S. District Court or has been decided in favor of complainant within the 2-year period; and (4) the requirements at 49 CFR 1105.7 (environmental reports), 49 CFR 1105.8 (historic reports), 49 CFR 1105.11 (transmittal letter), 49 CFR 1105.12 (newspaper publication), and 49 CFR 1152.50(d)(1) (notice to governmental agencies) have been met.

As a condition to this exemption, any employee adversely affected by the abandonment shall be protected under *Oregon Short Line R. Co.—Abandonment—Goshen*, 360 I.C.C. 91 (1979). To address whether this condition adequately protects affected employees, a petition for partial revocation under 49 U.S.C. 10502(d) must be filed.

Provided no formal expression of intent to file an offer of financial assistance (OFA) has been received, this exemption will be effective on February 25, 2006, unless stayed pending reconsideration. Petitions to stay that do not involve environmental issues,[1] formal expressions of intent to file an OFA under 49 CFR 1152.27(c)(2),[2] and trail use/rail banking requests under 49 CFR 1152.29 must be filed by February 3, 2006. Petitions to reopen or requests for public use conditions under 49 CFR 1152.28 must be filed by February 15, 2006, with the Surface Transportation Board, 1925 K Street, NW., Washington, DC 20423–0001.

A copy of any petition filed with the Board should be sent to BNSF's representative: Sidney L. Strickland, Jr.,

[1] The Board will grant a stay if an informed decision on environmental issues (whether raised by a party or by the Board's Section of Environmental Analysis (SEA) in its independent investigation) cannot be made before the exemption's effective date. *See Exemption of Out-of-Service Rail Lines,* 5 I.C.C.2d 377 (1989). Any request for a stay should be filed as soon as possible so that the Board may take appropriate action before the exemption's effective date.

[2] Each OFA must be accompanied by the filing fee, which is currently set at $1,200. *See* 49 CFR 1002.2(f)(25).

Sidney Strickland and Associates, PLLC, 3050 K Street, N.W., Suite 101, Washington, DC 20007.

If the verified notice contains false or misleading information, the exemption is void *ab initio.*

BNSF has filed environmental and historic reports that address the effects, if any, of the abandonment on the environment and historic resources. SEA will issue an environmental assessment (EA) by January 31, 2006. Interested persons may obtain a copy of the EA by writing to SEA (Room 500, Surface Transportation Board, Washington, DC 20423–0001) or by calling SEA, at (202) 565–1539. [Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1–800–877–8339.] Comments on environmental and historic preservation matters must be filed within 15 days after the EA becomes available to the public.

Environmental, historic preservation, public use, or trail use/rail banking conditions will be imposed, where appropriate, in a subsequent decision.

Pursuant to the provisions of 49 CFR 1152.29(e)(2), BNSF shall file a notice of consummation with the Board to signify that it has exercised the authority granted and fully abandoned the line. If consummation has not been effected by BNSF's filing of a notice of consummation by January 26, 2007, and there are no legal or regulatory barriers to consummation, the authority to abandon will automatically expire.

Board decisions and notices are available on our Web site at *http://www.stb.dot.gov.*

Decided: January 20, 2006.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams,

Secretary.

[FR Doc. E6–989 Filed 1–25–06; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF THE TREASURY

Fiscal Service

Surety Companies Acceptable on Federal Bonds: Amendment—ACSTAR Insurance Company

AGENCY: Financial Management Service, Fiscal Service, Department of the Treasury.

ACTION: Notice.

SUMMARY: This is Supplement No. 6 to the Treasury Department Circular 570; 2005 Revision, published July 1, 2005, at 70 FR 38502.

FOR FURTHER INFORMATION CONTACT: Surety Bond Branch at (202) 874–7102.

SUPPLEMENTARY INFORMATION: The underwriting limitation for ACSTAR Insurance Company, which was listed in the Treasury Department Circular 570, published on July 1, 2005, is hereby amended to read $2,737,000.

Federal bond-approving officers should annotate their reference copies of the Treasury Circular 570, 2005 Revision, at 70 FR 38503 to reflect this change, effective today.

The Circular may be viewed and downloaded through the Internet *http://www.fms.treas.gov/c570.* A hard copy may be purchased from the Government Printing Office (GPO), Subscription Service, Washington, DC, telephone (202) 512–1800. When ordering the Circular from GPO, use the following stock number: 769–004–0521–0.

Questions concerning this Notice may be directed to the U.S. Department of the Treasury, Financial Management Service, Financial Accounting and Services Division, Surety Bond Branch, 3700 East-West Highway, Room 6F01, Hyattsville, MD 20782.

Dated: January 13, 2006.

Vivian L. Cooper,

Director, Financial Accounting and Services Division, Financial Management Service.

[FR Doc. 06–713 Filed 1–25–06; 8:45 am]

BILLING CODE 4810–35–M

DEPARTMENT OF THE TREASURY

Fiscal Service

Surety Companies Acceptable on Federal Bonds: Termination—United Coastal Insurance Company

AGENCY: Financial Management Service, Fiscal Service, Department of the Treasury.

ACTION: Notice.

SUMMARY: This is Supplement No. 5 to the Treasury Department Circular 570; 2005 Revision, published July 1, 2005, at 70 FR 38502.

FOR FURTHER INFORMATION CONTACT: Surety Bond Branch at (202) 874–7102.

SUPPLEMENTARY INFORMATION: Notice is hereby given that the Certificate of Authority issued by the Treasury to the above named Company under the United States Code, title 31, Sections 9304–9308, to qualify as an acceptable surety on Federal bonds is terminated effective today.

The Company was last listed as an acceptable surety on Federal bonds at 70 FR 38502 on page 38542, July 1, 2005.

With respect to any bonds currently in force with above listed company, bond-approving officers may let such bonds run to expiration and need not secure new bonds. However, no new bonds should be accepted from the Company. In addition, bonds that are continuous in nature should not be renewed.

The Circular may be viewed and downloaded through the Internet at *http://www.fms.treas.gov/c570.* A hard copy may be purchased from the government Printing Office (GPO), Subscription Service, Washington, DC, telephone (202) 512–1800. When ordering the Circular from GPO, use the following stock number: 769–004–05219–0.

Questions concerning this notice may be directed to the U.S. Department of the Treasury, Financial Management Service, Financial Accounting and Services Division, Surety Bond Branch, 3700 East-West Highway, Room 6F01, Hyattsville, MD 20782.

Vivian L. Cooper,

Director, Financial Accounting and Services Division, Financial Management Service.

[FR Doc. 06–714 Filed 1–25–06; 8:45 am]

BILLING CODE 4810–35–M

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

Proposed Collection; Comment Request for Reporting and Procedures Regulations

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the Office of Foreign Assets Control (''OFAC'') within the Department of the Treasury is soliciting comments concerning OFAC's information collection requirements contained within OFAC's Reporting, Procedures and Penalties Regulations set forth at 31 CFR part 501.

DATES: Written comments should be received on or before March 27, 2006, to be assured of consideration.

ADDRESSES: Direct all written comments to ''Paperwork Reduction Act'' care of the Licensing Division, Office of Foreign Assets Control, Department of the

Treasury, 1500 Pennsylvania Avenue, NW., Annex—2d Floor, Washington, DC 20220.

FOR FURTHER INFORMATION CONTACT: Requests for additional information about the filings or procedures should be directed to the Licensing Division, Office of Foreign Assets Control, Department of the Treasury, 1500 Pennsylvania Avenue, NW., Annex—2d Floor, Washington, DC 20220.

SUPPLEMENTARY INFORMATION:

Title: Reporting, Procedures and Penalties Regulations.

OMB Number: 1505–0164.

Agency Form Number: TD–F–90–22.50.

Abstract: The collections of information are contained in §§ 501.601 through 501.605, 501.801, and 501.803 through 501.807 and pertain to the operation of various economic sanctions programs administered by OFAC under 31 CFR Chapter V. Section 501.601 relates to the maintenance of records and § 501.602 relates to OFAC demands for information relative to any transaction or property subject to the provisions of 31 CFR Chapter V. Section 501.603 imposes reporting requirements pertaining to blocked assets and retained funds transfers. This information is required by OFAC to monitor compliance with regulatory requirements, to support diplomatic negotiations concerning the targets of sanctions, and to support settlement negotiations addressing U.S. claims. Section 501.604 requires the filing of reports for compliance purposes by U.S. financial institutions where a funds transfer is not required to be blocked but is rejected because the underlying transaction is otherwise prohibited. Section 501.605 requires reporting of information pertaining to litigation, arbitration, and other binding alternative dispute resolution proceedings in the United States to prevent the intentional or inadvertent transfer through such proceedings of blocked property or retained funds. Sections 501.801 and 501.803 through 501.805 relate to license requests; the amendment, modification or revocation of licenses; rulemaking; and document requests. Section 501.806 sets forth the procedures to be followed by a person seeking to have funds released at a financial institution if the person believes that the funds were blocked due to mistaken identity. Section 501.807 sets forth the procedures to be followed by persons seeking administrative reconsideration of their designation or that of a vessel as blocked, or who wish to assert that the circumstances resulting in the designation are no longer applicable.

The likely respondents and recordkeepers affected by the information collections contained in part 501 are financial institutions, business organizations, and legal representatives. The estimated total annual reporting and/or recordkeeping burden is approximately 26,250 hours. The estimated annual burden per respondent/record keeper varies from thirty minutes to 10 hours, depending on individual circumstances, with an estimated average of 1.25 hours. The estimated number of respondents and/or record keepers is 21,000. The estimated annual frequency of responses: 1–12.

Current Actions: There are no changes being made to the notice at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Financial institutions, business organizations, and legal representatives.

Estimated Number of Respondents: 21,000.

Estimated Time Per Respondent: 1.25 hours.

Estimated Total Annual Burden Hours: 26,250.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained for five years.

Request for Comments

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information has practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: January 20, 2006.

Jamal El-Hindi,

Associate Director, Program Policy & Implementation, Office of Foreign Assets Control.

[FR Doc. E6–978 Filed 1–25–06; 8:45 am]

BILLING CODE 4810–25–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form 5472

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13(44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Form 5472, Information Return of a 25% Foreign-Owned U.S. Corporation or a Foreign Corporation Engaged in a U.S. Trade or Business.

DATES: Written comments should be received on or before March 27, 2006 to be assured of consideration.

ADDRESSES: Direct all written comments to Glenn P Kirkland, Internal Revenue Service, room 6516, 1111 Constitution Avenue, NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form and instructions should be directed to R. Joseph Durbala, at (202) 622–3634, Internal Revenue Service, room 6516, 1111 Constitution Avenue, NW., Washington, DC 20224 or through the Internet at *RJoseph.Durbala@irs.gov*.

SUPPLEMENTARY INFORMATION:

Title: Information Return of a 25% Foreign-Owned U.S. Corporation or a Foreign Corporation Engaged in a U.S. Trade or Business.

OMB Number: 1545–0805.

Form Number: 5472.

Abstract: Form 5472 is used to report information about transactions between a U.S. corporation that is 25% foreign owned or a foreign corporation that is engaged in a U.S. trade or business and related foreign parties. The IRS uses Form 5472 to determine if inventory or other costs deducted by the U.S. or foreign corporation are correct.

Current Actions: There are no changes being made to the form at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations.

Estimated Number of Responses: 103,784.

Estimated Time Per Response: 24 hrs. 46 min.

Estimated Total Annual Burden Hours: 2,569,692.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: January 19, 2006.

Glenn P. Kirkland,

IRS Reports Clearance Officer.

[FR Doc. E6–995 Filed 1–25–06; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form 8908

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Form 8908, Energy Efficient Home Credit.

DATES: Written comments should be received on or before March 27, 2006 to be assured of consideration.

ADDRESSES: Direct all written comments to Glenn P. Kirkland, Internal Revenue Service, room 6516, 1111 Constitution Avenue, NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form and instructions should be directed to R. Joseph Durbala, (202) 622–3634, at Internal Revenue Service, room 6516, 1111 Constitution Avenue, NW., Washington, DC 20224, or through the internet at *RJoseph.Durbala@irs.gov*.

SUPPLEMENTARY INFORMATION:

Title: Energy Efficient Home Credit.

OMB Number: 1545–1979

Form Number: 8908.

Abstract: Congress passed Public Law 109–58, the Energy Policy Act of 2005, on August 8, 2005, enacting legislation providing a tax credit for contractors producing new energy efficient homes.

We created Form 8908 to reflect new code section 45L which allows qualified contractors to claim a credit for each qualified energy-efficient home sold in tax years ending after December 31, 2005. The new credit ($2,000 or $1,000) is based on the energy saving requirements of the home. To qualify for the credit, the home must be acquired after 2005 but before January 2008.

Current Actions: There is no change in the paperwork burden previously approved by OMB. This form is being submitted for renewal purposes only.

Type of Review: Extension of a currently approved collection.

Affected Public: Businesses and other for-profit organizations.

Estimated Number of Respondents: 300,000.

Estimated Time Per Respondent: 2 hours, 35 minutes.

Estimated Total Annual Burden Hours: 777,000.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: January 18, 2006.

Glenn P. Kirkland,

IRS Reports Clearance Officer.

[FR Doc. E6–996 Filed 1–25–06; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form 8508

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Form 8508, Request for Waiver From Filing Information Returns Electronically/Magnetically (Forms W–2, W–2G, 1042–

S, 1098 Series, 1099 Series, 5498 Series, and 8027.

DATES: Written comments should be received on or before March 27, 2006 to be assured of consideration.

ADDRESSES: Direct all written comments to Glenn P. Kirkland, Internal Revenue Service, room 6516, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form and instructions should be directed to R. Joseph Durbala, (202) 622–3634, at Internal Revenue Service, room 6516, 1111 Constitution Avenue, NW., Washington, DC 20224, or through the Internet at *RJoseph.Durbala@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Request for Waiver From Filing Information Returns Electronically / Magnetically (Forms W–2, W–2G, 1042–S, 1098 Series, 1099 Series, 5498 Series, and 8027.

OMB Number: 1545–0957.

Form Number: Form 8508.

Abstract: Certain filers of information returns are required by law to file on magnetic media. In some instances, waivers from this requirement are necessary and justified. Form 8508 is submitted by the filer and provides information on which IRS will base its waiver determination.

Current Actions: There is no change in the paperwork burden previously approved by OMB. This form is being submitted for renewal purposes only.

Type of Review: Extension of a currently approved collection.

Affected Public: Businesses and other for-profit organizations, Farms, Federal Government, State, Local or Tribal Government, and Not-for-Profit institutions.

Estimated Number of Respondents: 1,000.

Estimated Time Per Respondent: 15 minutes.

Estimated Total Annual Burden Hours: 750.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: January 20, 2006.

Glenn P. Kirkland,

IRS Reports Clearance Officer.

[FR Doc. E6–997 Filed 1–25–06; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

[IA–14–91]

Proposed Collection; Comment Request For Regulation Project

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning an existing final regulation, IA–14–91 (TD 8454), Adjusted Current Earnings (§ 1.56(g)–1).

DATES: Written comments should be received on or before March 27, 2006 to be assured of consideration.

ADDRESSES: Direct all written comments to Glenn P. Kirkland, Internal Revenue Service, room 6516, 1111 Constitution Avenue, NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of this regulation should be directed to R. Joseph Durbala, at (202) 622–3634, Internal Revenue Service, room 6516, 1111 Constitution Avenue, NW., Washington, DC 20224, or through the Internet at *RJoseph.Durbala@irs.gov.*

SUPPLEMENTARY INFORMATION: *Title:* Adjusted Current Earnings.

OMB Number: 1545–1233.

Regulation Project Number: IA–14–91 (Final).

Abstract: Section 1.56(g)–1(r) of the regulation sets forth rules pursuant to section 56(g) of the Internal Revenue Code that permit taxpayers to elect a simplified method of computing their inventory amounts in order to compute their alternative minimum tax.

Current Actions: There is no change to this existing regulation.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations.

Estimated Number of Respondents: 1,000.

Estimated Time Per Respondent: 1 hour.

Estimated Total Annual Burden Hours: 1,000.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: January 20, 2006.

Glenn P. Kirkland,

IRS Reports Clearance Officer.

[FR Doc. E6–1004 Filed 1–25–06; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form 5884–A

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Form 5884–A, Credits for Employers Affected by Hurricane Katrina, Rita, or Wilma.

DATES: Written comments should be received on or before March 27, 2006 to be assured of consideration.

ADDRESSES: Direct all written comments to Glenn P. Kirkland, Internal Revenue Service, Room 6516, 1111 Constitution Avenue, NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form and instructions should be directed to R. Joseph Durbala, (202) 622–3634, at Internal Revenue Service, Room 6516, 1111 Constitution Avenue, NW., Washington, DC 20224, or through the Internet at *RJoseph.Durbala@irs.gov*.

SUPPLEMENTARY INFORMATION:

Title: Credits for Employers Affected by Hurricane Katrina, Rita, or Wilma.

OMB Number: 1545–1978.

Form Number: 5884–A.

Abstract: Qualified employers will file Form 5884–A to claim a credit for wages paid to employees kept on the payroll for the period the business is rendered inoperable as a result of damages inflicted by Hurricane Katrina.

Current Actions: There is no change in the paperwork burden previously approved by OMB. This form is being submitted for renewal purposes only.

Type of Review: Extension of a currently approved collection.

Affected Public: Businesses and other for-profit organizations.

Estimated Number of Respondents: 250,000.

Estimated Time Per Respondent: 3 hours, 58 minutes.

Estimated Total Annual Burden Hours: 992,500.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: January 18, 2006.

Glenn P. Kirkland,

IRS Reports Clearance Officer.

[FR Doc. E6–1005 Filed 1–25–06; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Open Meeting of the Area 2 Taxpayer Advocacy Panel (Including the States of Delaware, North Carolina, South Carolina, New Jersey, Maryland, Pennsylvania, Virginia, West Virginia and the District of Columbia)

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Amended notice (change of date).

SUMMARY: An open meeting of the Area 2 Taxpayer Advocacy Panel will be conducted (via teleconference). The Taxpayer Advocacy Panel is soliciting public comments, ideas, and suggestions on improving customer service at the Internal Revenue Service.

DATES: The meeting will be held Wednesday, February 15, 2006, at 2:30 p.m. ET.

FOR FURTHER INFORMATION CONTACT: Inez E. De Jesus at 1–888–912–1227, or 954–423–7977.

SUPPLEMENTARY INFORMATION: Notice is hereby given pursuant to section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1988) that an open meeting of the Area 2 Taxpayer Advocacy Panel will be held Wednesday, February 15, 2006 at 2:30 p.m. ET via a telephone conference call. If you would like to have the TAP consider a written statement, please call 1–888–912–1227 or 954–423–7977, or write Inez E. De Jesus, TAP Office, 1000 South Pine Island Rd., Suite 340, Plantation, FL 33324. Due to limited conference lines, notification of intent to participate in the telephone conference call meeting must be made with Inez E. De Jesus. Ms. De Jesus can be reached at 1–888–912–1227 or 954–423–7977, or post comments to the Web site: *http://www.improveirs.org.*

The agenda will include the following: Various IRS issues.

Dated: January 20, 2006.

Martha Curry,

Acting Director, Taxpayer Advocacy Panel.

[FR Doc. E6–944 Filed 1–25–06; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Open Meeting of the Area 6 Taxpayer Advocacy Panel (Including the States of Arizona, Colorado, Idaho, Montana, New Mexico, North Dakota, Oregon, South Dakota, Utah, Washington and Wyoming)

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice.

SUMMARY: An open meeting of the Area 6 committee of the Taxpayer Advocacy Panel will be conducted (via teleconference). The Taxpayer Advocacy Panel (TAP) is soliciting public comments, ideas, and suggestions on improving customer service at the Internal Revenue Service. The TAP will use citizen input to make recommendations to the Internal Revenue Service.

DATES: The meeting will be held Thursday, February 23, 2006.

FOR FURTHER INFORMATION CONTACT: Dave Coffman at 1–888–912–1227, or 206–220–6096.

SUPPLEMENTARY INFORMATION: Notice is hereby given pursuant to Section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1988) that an open meeting of the Area 6 Taxpayer Advocacy Panel will be held Thursday, February 23, 2006 from 10 a.m. Pacific Time to 11:30 a.m. Pacific Time via a telephone conference call. The public is invited to make oral comments. Individual comments will be limited to 5 minutes. If you would like to have the TAP consider a written statement, please call 1–888–912–1227 or 206–220–6096, or write to Dave Coffman, TAP Office, 915 2nd Avenue, MS W–406, Seattle, WA 98174 or you can contact us at *http://www.improveirs.org.* Due to limited conference lines, notification of intent to participate in the telephone conference call meeting must be made with Dave Coffman. Mr. Coffman can be reached at 1–888–912–1227 or 206–220–6096.

The agenda will include the following: Various IRS issues.

Dated: January 23, 2006.

Martha Curry,

Acting Director, Taxpayer Advocacy Panel.

[FR Doc. E6–994 Filed 1–25–06; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0227]

Proposed Information Collection Activity: Proposed Collection; Comment Request

AGENCY: Veterans Health Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: The Veterans Health Administration (VHA), Department of Veterans Affairs (VA), is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of a currently approved collection, and allow 60 days for public comment in response to the notice. This notice solicits comments on information needed to determine whether VA is providing quality of health-care services to its patients.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before March 27, 2006.

ADDRESSES: Submit written comments on the collection of information to Ann W. Bickoff (193E1), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420 or e-mail: *ann.bickoff@hq.med.va.gov.* Please refer to ''OMB Control No. 2900–0227'' in any correspondence.

FOR FURTHER INFORMATION CONTACT: Ann W. Bickoff at (202) 273–8310 or FAX (202) 273–9381.

SUPPLEMENTARY INFORMATION: Under the PRA of 1995 (Pub. L. 104–13; 44 U.S.C. 3501–3521), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to Section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VHA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of VHA's functions, including whether the information will have practical utility; (2) the accuracy of VHA's estimate of the burden of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or the use of other forms of information technology.

Title: Nation-wide Customer Satisfaction Surveys.

a. Survey of Healthcare Experiences of Patients Recently Discharged Inpatient, VA Form 10–1465–1.

b. Survey of Healthcare Experiences of Patients Ambulatory Care, VA Form 10–1465–3.

c. About Your VA Prosthetics Care and Service, VA Form 10–0142b.

d. Survey on Your VA Home Based Primary Care (HBPC), VA Form 10–1465–9.

e. Customer Satisfaction Survey for Nutritional and Food Service, VA Form 10–5387.

OMB Control Number: 2900–0227.

Type of Review: Extension of a currently approved collection.

Abstract: VA Forms 10–0142b, 10–1465–1, 10–1465–3, 10–1465–9, and 10–5387 will be used to survey customers regarding their satisfaction with VA's healthcare services. VA will use the data collected to identify areas where attention is needed and to improve its quality of health care services provided to veterans.

Affected Public: Individuals or households.

Estimated Annual Burden: 200,507 hours.

a. Survey of Healthcare Experiences of Patients Recently Discharged Inpatient, VA Form 10–1465–1—37,500.

b. Survey of Healthcare Experiences of Patients Ambulatory Care, VA Form 10–1465–3—153,300.

c. About your VA Prosthetics Care and Service, VA Form 10–0142b—4,320.

d. Survey on Your Home Based Primary Care (HBPC), VA Form 10–1465–9—1,200.

e. Customer Satisfaction Survey for Nutritional and Food Service, VA Form 10–5387—4,187.

Estimated Average Burden Per Respondent:

a. Survey of Healthcare Experiences of Patients Recently Discharged Inpatient, VA Form 10–1465–1—30 minutes.

b. Survey of Healthcare Experiences of Patients Ambulatory Care, VA Form 10–1465–3—30 minutes.

c. About your VA Prosthetics Care and Service, VA Form 10–0142b—24 minutes.

d. Survey on Your Home Based Primary Care, VA Form 10–1465–9—15 minutes.

e. Customer Satisfaction Survey Nutritional and Food Service, VA Form 10–5387—2 minutes.

Frequency of Response: On occasion.

Estimated Number of Respondents: 439,400.

a. Survey of Healthcare Experiences of Patients Recently Discharged Inpatient, VA Form 10–1465–1—75,000.

b. Survey of Healthcare Experiences of Patients Ambulatory Care, VA Form 10–1465–3—306,600.

c. About your VA Prosthetics Care and Service, VA Form 10–0142b—21,600.

d. Survey on Your Home Based Primary Care, VA Form 10–1465–9—4,800.

e. Customer Satisfaction Survey Nutritional and Food Service, VA Form 10–5387—31,400.

Estimated Total Annual Responses:

a. Survey of Healthcare Experiences of Patients Recently Discharged Inpatient, VA Form 10–1465–1—75,000.

b. Survey of Healthcare Experiences of Patients Ambulatory Care, VA Form 10–1465–3—306,600.

c. About your VA Prosthetics Care and Service, VA Form 10–0142b—10,800.

d. Survey on Your Home Based Primary Care, VA Form 10–1465–9—4,800.

e. Customer Satisfaction Survey Nutritional and Food Service, VA Form 10–5387—125,600.

Dated: January 17, 2006.

By direction of the Secretary:

Denise McLamb,

Program Analyst, Records Management Service.

[FR Doc. E6–1011 Filed 1–25–06; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–New]

Agency Information Collection Activities Under OMB Review

AGENCY: Office of Small and Disadvantaged Business Utilization, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–21), this notice announces that the Veterans Office of Small and Disadvantaged Business Utilization (OSDBU), Department of Veterans Affairs, has submitted the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden; it includes the actual data collection instrument.

DATES: Comments must be submitted on or before February 27, 2006.

FOR FURTHER INFORMATION OR A COPY OF THE SUBMISSION CONTACT: Denise McLamb, Information Management Service (005E3), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 565–8374 or FAX (202) 565–6950 or e-mail: *denise.mclamb@mail.va.gov*. Please refer to ''OMB Control No. 2900-New.''

Send comments and recommendations concerning any aspect of the information collection to VA's OMB Desk Officer, OMB Human Resources and Housing Branch, New Executive Office Building, Room 10235, Washington, DC 20503 (202) 395–7316. Please refer to ''OMB Control No. 2900-New'' in any correspondence.

SUPPLEMENTARY INFORMATION:

Title: VetBiz Vendor Information Pages.

OMB Control Number: 2900-New.

Type of Review: New collection.

Abstract: The Vendor Information Pages (VIP) will be used to assist federal agencies in identifying small business owned and controlled by veterans and service-connected disable veterans. This information is necessary to ensure that veteran own businesses are given the opportunity to participate in Federal contractors and receive contract solicitations information automatically.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published on November 10, 2005 at page 68513.

Affected Public: Business or other for-profit and Individuals or households.

Estimated Annual Burden: 2,500 hours.

Estimated Average Burden Per Respondent: 25 minutes.

Frequency of Response: On occasion.

Estimated Number of Respondents: 6,000.

Dated: January 13, 2006.

By direction of the Secretary:

Denise McLamb,

Program Analyst, Records Management Service.

[FR Doc. E6–1012 Filed 1–25–06; 8:45 am]

BILLING CODE 8320–01–P

Federal Register

Thursday,
January 26, 2006

Part II

Department of State

Office of Oceans Affairs; New Conservation Measures for Antarctic Fishing Under the Auspices of CCAMLR; Notice

DEPARTMENT OF STATE

[ID.122005D]

Office of Oceans Affairs; New Conservation Measures for Antarctic Fishing Under the Auspices of CCAMLR

AGENCY: Office of Oceans Affairs, Department of State.

ACTION: Notice.

SUMMARY: At its Twenty-Fourth Meeting in Hobart, Tasmania, from October 24 to November 4, 2005, the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR), of which the United States is a member, adopted conservation measures, pending countries' approval, pertaining to fishing in the CCAMLR Convention Area. All the measures were agreed upon in accordance with Article IX of the Convention for the Conservation of Antarctic Marine Living Resources. Measures adopted restrict overall catches of certain species of fish and crabs, restrict fishing in certain areas, specify implementation and inspection obligations supporting the Catch Documentation Scheme of Contracting Parties, and promote compliance with CCAMLR measures by non-Contracting Party vessels. This notice includes the full text of the conservation measures adopted at the Twenty-Fourth meeting of CCAMLR. For all of the conservation measures in force, see the CCAMLR Web site at *http://www.ccamlr.org*. This notice, therefore, together with the U.S. regulations referenced under the Supplementary Information, provides a comprehensive register of all current U.S. obligations under CCAMLR.

DATES: Persons wishing to comment on the measures or desiring more information should submit written comments by February 27, 2006.

FOR FURTHER INFORMATION CONTACT: Hunter H. Cashdollar, Office of Oceans Affairs (OES/OA), Room 5805, Department of State, Washington, DC 20520; tel: 202–647–3947; fax: 202–647–9099; e-mail: *cashdollarhh@state.gov.*

SUPPLEMENTARY INFORMATION: Individuals interested in CCAMLR should also see 15 CFR Chapter III—International Fishing and Related Activities, Part 300—International Fishing Regulations, Subpart A—General; Subpart B—High Seas Fisheries; and Subpart G—Antarctic Marine Living Resources, for other regulatory measures related to conservation and management in the CCAMLR Convention area. Subpart B notes the requirements for high seas fishing vessel licensing. Subparts A and G describe the process for regulating U.S. fishing in the CCAMLR Conventional area and contain the text of CCAMLR Conservation Measures that are not expected to change from year to year. The regulations in Subparts A and G include sections on: Purpose and scope; Definitions; Relationship to other treaties, conventions, laws and regulations; Procedure for according protection to CCAMLR Ecosystem Monitoring Program Sites; Scientific Research; Initiating a new fishery; Exploratory fisheries; Reporting and record keeping requirements; Vessel and gear identification; Gear disposal; Mesh Size; Harvesting permits; Import permits; Appointment of a designated representative; Prohibitions; Facilitation of enforcement and inspection; and Penalties.

Review of existing conservation measures and resolutions:

The Commission noted that the following conservation measures will lapse on 30 November 2005: 32–09 (2004), 33–02 (2004), 33–03 (2004), 41–01 (2004), 41–02 (2004), 41–04 (2004), 41–05 (2004), 41–06 (2004), 41–07 (2004), 41–08 (2004), 41–09 (2004), 41–10 (2004), 41–11 (2004), 42–02 (2004), 52–01 (2004), 52–02 (2004) and 61–01 (2004). The Commission also noted that Conservation Measure 42–01 (2004) will lapse on 14 November 2005. All of these measures dealt with fishery-related matters for the 2004/05 season.

The Commission agreed that the following conservation measures will remain in force in 2005/06: Compliance 10–01 (1998), 10–02 (2004). General Fishery Matters 21–01 (2002), 22–01 (1986), 22–02 (1984), 22–03 (1990), 23–02 (1993), 23–03 (1991), 23–04 (2000), 23–05 (2000), 25–01 (1996), 25–03 (2003). Fishery Regulations 31–01 (1986), 32–01 (2001), 32–02 (1998), 32–03 (1998), 32–04 (1986), 32–05 (1986), 32–06 (1985), 32–07 (1999), 32–08 (1997), 32–10 (2002), 32–11 (2002), 32–16 (2003), 32–17 (2003), 33–01 (1995), 51–01 (2002), 51–02 (2002), 51–03 (2002). Protected Areas 91–01 (2004), 91–02 (2004), 91–03 (2004).

At its twenty-fourth meeting in Hobart, Tasmania, the Commission agreed that the following resolutions will remain in force in 2005/06: 7/IX, 10/XII, 14/XIX, 15/XXII, 16/XIX, 17/XX, 18/XXI, 19/XXI, 20/XXII, 21/XXIII, 22/XXIII and 23/XXIII.

New and Revised Conservation Measures. The Commission revised the following conservation measures at its twenty-fourth meeting: Compliance 10–03 (2002), 10–04 (2004), 10–05 (2004), 10–06 (2004), 10–07 (2003). General fishery matters: 21–02 (2004), 23–01 (2004), 23–06 (2004), 24–01 (2003), 24–02 (2004) and 25–02 (2003).

In addition, thirty Conservation Measures and one Resolution were adopted at the twenty-fourth meeting: (For further information, see the CCAMLR Web site at *http://www.ccamlr.org* under Publications for the Schedule of Conservation Measures in Force (2005/2006), or contact the Commission at the CCAMLR Secretariat, P.O. Box 213, North Hobart, Tasmania 7002, Australia. Tel: (61) 3–6234–9965.)

Conservation Measures and Resolutions Adopted at CCAMLR–XXIV

Conservation Measure 10–03 (2005)[1 2 3]

Port Inspections of Vessels Carrying Toothfish

1. Contracting Parties shall undertake inspections of all fishing vessels carrying *Dissostichus* spp. which enter their ports. The inspection shall be for the purpose of determining that if the vessel carried out harvesting activities in the Convention Area, these activities were carried out in accordance with CCAMLR conservation measures, and that if it intends to land or tranship *Dissostichus* spp. the catch to be unloaded or transhipped is accompanied by a *Dissostichus* catch document required by Conservation Measure 10–05 and that the catch agrees with the information recorded on the document.

2. To facilitate these inspections, Contracting Parties shall require vessels to provide advance notice of their entry into port and to convey a written declaration that they have not engaged in or supported illegal, unreported and unregulated (IUU) fishing in the Convention Area. The inspection shall be conducted within 48 hours of port entry and shall be carried out in an expeditious fashion. It shall impose no undue burdens on the vessel or its crew, and shall be guided by the relevant provisions of the CCAMLR System of Inspection. Vessels which either declare that they have been involved in IUU fishing or fail to make a declaration shall be denied port access, other than for emergency purposes.

3. In the event that there is evidence that the vessel has fished in contravention of CCAMLR conservation measures, the catch shall not be landed or transshipped. The Contracting Party will inform the Flag State of the vessel of its inspection findings and will cooperate with the Flag State in taking such appropriate action as is required to investigate the alleged infringement and, if necessary, apply appropriate sanctions in accordance with national legislation.

4. Contracting Parties shall promptly provide the Secretariat with a report on the outcome of each inspection conducted under this conservation measure. In respect of any vessels denied port access or permission to land or tranship *Dissostichus* spp., the Secretariat shall promptly convey such reports to all Contracting Parties and to all non-Contracting Parties cooperating with the Commission by participating in the Catch Documentation.

Scheme for *Dissostichus* spp. (CDS)

[1] Except for waters adjacent to the Kerguelen and Crozet Islands.

[2] Except for waters adjacent to the Prince Edward Islands.

[3] Excluding by-catches of *Dissostichus* spp. by trawlers fishing on the high seas outside the Convention Area. A by-catch shall be defined as no more than 5% of total catch of all species and no more than 50 tonnes for an entire fishing trip by a vessel.

Conservation Measure 10–04 (2005)

Automated Satellite-Linked Vessel Monitoring Systems (VMS)

Species all except krill
Area all
Season all
Gear all

The Commission, recognizing that in order to promote the objectives of the Convention and further improve compliance with the relevant conservation measures, Convinced that illegal, unreported and unregulated (IUU) fishing compromises the objective of the Convention, recalling that Contracting Parties are required to cooperate in taking appropriate action to deter any fishing activities which are not consistent with the objective of the Convention, mindful of the rights and obligations of Flag States and Port States to promote the effectiveness of conservation measures, wanting to reinforce the conservation measures already adopted by the Commission, recognising the obligations and responsibilities of Contracting Parties under the Catch Documentation Scheme for *Dissostichus* spp. (CDS), Recalling provisions as made under Article XXIV of the Convention, Committed to take steps, consistent with international law, to identify the origins of 589 *Dissostichus* spp. entering the markets of Contracting Parties and to determine whether *Dissostichus* spp. harvested in the Convention Area that is imported into their territories was caught in a manner consistent with CCAMLR conservation measures, hereby adopts the following conservation measure in accordance with Article IX of the Convention:

1. Each Contracting Party shall ensure that its fishing vessels, licensed [1] in accordance with Conservation Measure 10–02, are equipped with a satellite-linked vessel monitoring device allowing for the continuous reporting of their position in the Convention Area for the duration of the license issued by the Flag State. The vessel monitoring device shall automatically communicate at least every four hours to a land-based fisheries monitoring centre (FMC) of the Flag State of the vessel the following data:

(i) Fishing vessel identification;

(ii) The current geographical position (latitude and longitude) of the vessel, with a position error which shall be less than 500 m, with a confidence interval of 99%; and

(iii) The date and time (expressed in UTC) of the fixing of the said position of the vessel.

2. The implementation of vessel monitoring device(s) on vessels while participating only in a krill fishery is not currently required.

3. Each Contracting Party as a Flag State shall ensure that the vessel monitoring device(s) on board its vessels are tamper proof, *i.e.* are of a type and configuration that prevent the input or output of false positions, and that are not capable of being over-ridden, whether manually, electronically or otherwise. To this end, the on-board satellite monitoring device must:

(i) Be located within a sealed unit; and

(ii) Be protected by official seals (or mechanisms) of a type that indicate whether the unit has been accessed or tampered with.

4. In the event that a Contracting Party has information to suspect that an on-board vessel monitoring device does not meet the requirements of paragraph 3, or has been tampered with, it shall immediately notify the Secretariat and the vessel's Flag State.

5. Each Contracting Party shall ensure that its FMC receives Vessel Monitoring System (VMS) reports and messages, and that the FMC is equipped with computer hardware and software enabling automatic data processing and electronic data transmission. Each Contracting Party shall provide for backup and recovery procedures in case of system failures.

6. Masters and owners/licensees of fishing vessels subject to VMS shall ensure that the vessel monitoring device on board their vessels within the Convention Area is at all times fully operational as per paragraph 1, and that the data are transmitted to the Flag State. Masters and owners/licensees shall in particular ensure that:

(i) VMS reports and messages are not altered in any way;

(ii) The antennae connected to the satellite monitoring device are not obstructed in anyway;

(iii) The power supply of the satellite monitoring device is not interrupted in any way; and

(iv) The vessel monitoring device is not removed from the vessel.

7. A vessel monitoring device shall be active within the Convention Area. It may, however, be switched off when the fishing vessel is in port for a period of more than one week, subject to prior notification to the Flag State, and if the Flag State so desires also to the Secretariat, and providing that the first position report generated following the repowering (activating) shows that the fishing vessel has not changed position compared to the last report.

8. In the event of a technical failure or non-functioning of the vessel monitoring device on board the fishing vessel, the master or the owner of the vessel, or their representative, shall communicate to the Flag State every six hours, and if the Flag State so desires also to the Secretariat, starting at the time that the failure or the non-functioning was detected or notified in accordance with paragraph 12, the up-to-date geographical position of the vessel by electronic means (email, facsimile, telex, telephone message, radio).

9. Vessels with a defective vessel monitoring device shall take immediate steps to have the device repaired or replaced as soon as possible and, in any event, within two months. If the vessel during that time returns to port, it shall not be allowed by the Flag State to commence a further fishing trip in the Convention Area without having the defective device repaired or replaced.

10. When the Flag State has not received for 12 hours data transmissions referred to in paragraphs 1 and 8, or has reasons to doubt the correctness of the data transmissions under paragraphs 1 and 8, it shall as soon as possible notify the master or the owner or the representative thereof. If this situation occurs more than two times within a period of one year in respect of a particular vessel, the Flag State of the vessel shall investigate the matter, including having an authorized official check the device in question, in order to establish whether the equipment has been tampered with. The outcome of this investigation shall be forwarded to the CCAMLR Secretariat within 30 days of its completion.

11.[2] [3] Each Contracting Party shall forward VMS reports and messages received, pursuant to paragraph 1, to the CCAMLR Secretariat as soon as possible:

(i) But not later than four hours after receipt for those exploratory longline fisheries subject to conservation measures adopted at CCAMLR–XXIV; or

(ii) But not later than 10 working days following departure from the Convention Area for all other fisheries.

12. With regard to paragraphs 8 and 11(i), each Contracting Party shall, as soon as possible but no later than two working days following detection or notification of technical failure or non-functioning of the vessel monitoring device on board the fishing vessel, forward the geographical positions of the vessel to the Secretariat, or shall ensure that these positions are forwarded to the Secretariat by the master or the owner of the vessel, or their representative.

13. Each Flag State shall ensure that VMS reports and messages transmitted by the Contracting Party or its fishing vessels to the CCAMLR Secretariat, are in a computer readable form in the data exchange format set out in Annex 10–04/A.

14. Each Flag State shall in addition notify the CCAMLR Secretariat as soon as possible of each entry to, exit from and movement between sub areas and divisions of the Convention Area by each of its fishing vessels in the format outlined in Annex 10–04/A.

15. Without prejudice to its responsibilities as a Flag State, if the Contracting Party so desires, it shall ensure that each of its vessels communicates the reports referred to in paragraphs 11 and 14 in parallel to the CCAMLR Secretariat.

16. Each Flag State shall notify the name, address, email, telephone and facsimile numbers, as well as the address of electronic communication of the relevant authorities of their FMC to the CCAMLR Secretariat before 1 January 2005 and thereafter any changes without delay.

17. In the event that the CCAMLR Secretariat has not, for 48 consecutive hours, received the data transmissions referred to in paragraph 11(i), it shall promptly notify the Flag State of the vessel and require an explanation. The CCAMLR Secretariat shall promptly inform the Commission if the data transmissions at issue, or the Flag State explanation, are not received from the Contracting Party within a further five working days.

18. The CCAMLR Secretariat and all Parties receiving data shall treat all VMS reports and messages received under paragraph 11 or paragraphs 19, 20, 21 or 22 in a confidential manner in accordance with the confidentiality rules established by the Commission as contained in Annex 10–04/B. Data from individual vessels shall be used for compliance purposes only, namely for:

(i) Active surveillance presence, and/or inspections by a Contracting Party in a specified CCAMLR sub area or division; or

(ii) The purposes of verifying the content of a *Dissostichus* Catch Document (DCD).

19. The CCAMLR Secretariat shall place a list of vessels submitting VMS reports and messages pursuant to this conservation measure on a password-protected section of the CCAMLR website. This list shall be divided into sub areas and divisions, without indicating the exact positions of vessels, and be updated when a vessel changes sub area or division. The list shall be posted daily by the Secretariat, establishing an electronic archive.

20. VMS reports and messages (including vessel locations), for the purposes of paragraph 18(i) above, may be provided by the Secretariat to a Contracting Party other than the Flag State without the permission of the Flag State only during active surveillance, and/or inspection in accordance with the CCAMLR System of Inspection and subject to the time frames set out in paragraph 11. In this case, the Secretariat shall provide VMS reports and messages, including vessel locations over the previous 10 days, for vessels actually detected during surveillance, and/or inspection by a Contracting Party, and VMS reports and messages (including vessel locations) for all vessels within 100 n miles of that same location. The Flag State(s) concerned shall be provided by the Party conducting the active surveillance, and/or inspection, with a report including name of the vessel or aircraft on active surveillance, and/or inspection under the CCAMLR System of Inspection, and the full name(s) of the CCAMLR inspector(s) and their ID number(s). The Parties conducting the active surveillance, and/or inspection will make every reasonable effort to make this information available to the Flag State(s) as soon as possible.

21. A Party may contact the Secretariat prior to conducting active surveillance, and/or inspection in accordance with the CCAMLR System of Inspection, in a given area and request VMS reports and messages (including vessel locations), for vessels in that area. The Secretariat shall provide this information only with the permission of the Flag State for each of the vessels and according to the time frames set out in paragraph 11. On receipt of Flag State permission the Secretariat shall provide regular updates of positions to the Contracting Party for the duration of the active surveillance, and/or inspection in accordance with the CCAMLR System of Inspection.

22. A Contracting Party may request actual VMS reports and messages (including vessel locations) from the Secretariat for a vessel when verifying the claims on a DCD. In this case the Secretariat shall provide that data only with Flag State permission.

23. The CCAMLR Secretariat shall annually, before 30 September, report on the implementation of and compliance with this conservation measure to the Commission.

[1] Includes vessels licensed under French domestic law and vessels licensed under South African domestic law.

[2] This paragraph does not apply to vessels licensed under French domestic law in the EEZs surrounding Kerguelen and Crozet Islands.

[3] This paragraph does not apply to vessels licensed under South African domestic law in the EEZ surrounding Prince Edward Islands.

Annex 10–04/A

VMS Data Format

'Position', 'Exit' and 'Entry' Reports Messages

Data element Field code.
Mandatory/Optional Remarks.
Start record SR M System detail; indicates start of record.
Address AD M Message detail; destination; 'XCA' for CCAMLR.
Sequence number SQ M [1] Message detail; message serial number in current year.
Type of message TM [2] M Message detail; message type, 'POS' as position report/message to be communicated by VMS or other means by vessels with a defective satellite tracking device.
Radio call sign RC M Vessel registration detail; international radio call sign of the vessel.
Trip number TN O Activity detail; fishing trip serial number in current year.
Vessel name NA M Vessel registration detail; name of the vessel.
Contracting Party internal reference number IR O Vessel registration detail. Unique Contracting Party vessel number as ISO–3 Flag State code followed by number.
External registration number XR O Vessel registration detail; the side number of the vessel.
Latitude LA M [3] Activity detail; position.
Longitude LO M [3] Activity detail; position.
Latitude (decimal) LT M [4] Activity detail; position.
Longitude (decimal) LG M [4] Activity detail; position.
Date DA M Message detail; position date.
Time TI M Message detail; position time in UTC.

End of record ER M System detail; indicates end of the record.

[1] Optional in case of a VMS message.

[2] Type of message shall be ''ENT'' for the first VMS message from the Convention Area as detected by the FMC of the Contracting Party, or as directly submitted by the vessel. Type of message shall be 'EXI' for the first VMS message from outside the Convention Area as detected by the FMC of the Contracting Party or as directly submitted by the vessel, and the values for latitude and longitude are, in this type of message, optional. Type of message shall be 'MAN' for reports communicated by vessels with a defective satellite tracking device.

[3] Mandatory for manual messages.

[4] Mandatory for VMS messages.

Annex 10–04/B

Provisions on Secure and Confidential Treatment of Electronic Reports and Messages Transmitted Pursuant to Conservation Measure 10–04

1. Field of Application

1.1 The provisions set out below shall apply to all VMS reports and messages transmitted and received pursuant to Conservation Measure 10–04.

2. General Provisions

2.1 The CCAMLR Secretariat and the appropriate authorities of Contracting Parties transmitting and receiving VMS reports and messages shall take all necessary measures to comply with the security and confidentiality provisions set out in sections 3 and 4.

2.2 The CCAMLR Secretariat shall inform all Contracting Parties of the measures taken in the Secretariat to comply with these security and confidentiality provisions.

2.3 The CCAMLR Secretariat shall take all the necessary steps to ensure that the requirements pertaining to the deletion of VMS reports and messages handled by the Secretariat are complied with.

2.4 Each Contracting Party shall guarantee the CCAMLR Secretariat the right to obtain as appropriate, the rectification of reports and messages or the erasure of VMS reports and messages, the processing of which does not comply with the provisions of Conservation Measure 10–04.

3. Provisions on Confidentiality

3.1 All requests for data must be made to the CCAMLR Secretariat in writing. Requests for data must be made by the main Commission Contact or an alternative contact nominated by the main Commission Contact of the Contracting Party concerned. The Secretariat shall only provide data to a secure email address specified at the time of making a request for data.

3.2 In cases where the CCAMLR Secretariat is required to seek the permission of the Flag State before releasing VMS reports and messages to another Party, the Flag State shall respond to the Secretariat as soon as possible but in any case within two working days.

3.3 Where the Flag State chooses not to give permission for the release of VMS reports and messages, the Flag State shall, in each instance, provide a written report within 10 working days to the Commission outlining the reasons why it chooses not to permit data to be released. The CCAMLR Secretariat shall place any report so provided, or notice that no report was received, on a password-protected part of the CCAMLR website.

3.4 VMS reports and messages shall only be released and used for the purposes stipulated in paragraph 18 of Conservation Measure 10–04.

3.5 VMS reports and messages released pursuant to paragraphs 20, 21 and 22 of Conservation Measure 10–04 shall provide details of: name of vessel, date and time of position report, and latitude and longitude position at time of report.

3.6 Regarding paragraph 21 each inspecting Contracting Party shall make available VMS reports and messages and positions derived there from only to their inspectors designated under the CCAMLR System of Inspection. VMS reports and messages shall be transmitted to their inspectors no more than 48 hours prior to entry into the CCAMLR, sub area or division where surveillance is to be conducted by the Contracting Party. Contracting Parties must ensure that VMS reports and messages are kept confidential by such inspectors.

3.7 The CCAMLR Secretariat shall delete all the original VMS reports and messages referred to in section 1 from the database at the CCAMLR Secretariat by the end of the first calendar month following the third year in which the VMS reports and messages have originated. Thereafter the information related to the movement of the fishing vessels shall only be retained by the CCAMLR Secretariat after measures have been taken to ensure that the identity of the individual vessels can no longer be established.

3.8 Contracting Parties may retain and store VMS reports and messages provided by the Secretariat for the purposes of active surveillance presence, and/or inspections, until 24 hours after the vessels to which the reports and messages pertain have departed from the CCAMLR sub area or division. Departure is deemed to have been effected six hours after the transmission of the intention to exit from the CCAMLR sub area or division.

4. Provisions on Security

4.1 Overview

4.1.1 Contracting Parties and the CCAMLR Secretariat shall ensure the secure treatment of VMS reports and messages in their respective electronic data processing facilities, in particular where the processing involves transmission over a network. Contracting Parties and the CCAMLR Secretariat must implement appropriate technical and organizational measures to protect reports and messages against accidental or unlawful destruction or accidental loss, alteration, unauthorized disclosure or access, and against all inappropriate forms of processing.

4.1.2 The following security issues must be addressed from the outset:

- System access control: The system has to withstand a break-in attempt from unauthorized persons.
- Authenticity and data access control: The system has to be able to limit the access of authorized parties to a predefined set of data only
- Communication security: It shall be guaranteed that VMS reports and messages are securely communicated.
- Data security: It has to be guaranteed that all VMS reports and messages that enter the system are securely stored for the required time and that they will not be tampered with.
- Security procedures: Security procedures shall be designed addressing access to the system (both hardware and software), system administration and maintenance, backup and general usage of the system.

4.1.3 Having regard to the state of the art and the cost of their implementation, such measures shall ensure a level of security appropriate to the risks represented by the processing of the reports and the messages.

4.1.4 Security measures are described in more detail in the following paragraphs.

4.2 System Access Control

4.2.1 The following features are the mandatory requirements for the VMS installation located at the CCAMLR Data Centre:

- A stringent password and authentication system: each user of the system is assigned a unique user identification and associated password. Each time the user logs on to the system he/she has to provide the correct password. Even when successfully logged on the user only has access to those and only those functions and data that he/she is configured to have access

to. Only a privileged user has access to all the data.

• Physical access to the computer system is controlled.

• Auditing: Selective recording of events for analysis and detection of security breaches.

• Time-based access control: access to the system can be specified in terms of times-of-day and days-of-week that each user is allowed to log on to the system.

• Terminal access control: Specifying for each workstation which users are allowed to access.

4.3 Authenticity and Data Access Security

4.3.1 Communication between Contracting Parties and the CCAMLR Secretariat for the purpose of Conservation Measure 10–04 shall use secure Internet protocols SSL, DES or verified certificates obtained from the CCAMLR Secretariat.

4.4 Data Security

4.4.1 Access limitation to the data shall be secured via a flexible user identification and password mechanism. Each user shall be given access only to the data necessary for their task.

4.5 Security Procedures

4.5.1 Each Contracting Party and the CCAMLR Secretariat shall nominate a security system administrator. The security system administrator shall review the log files generated by the software for which they are responsible, properly maintain the system security for which they are responsible, restrict access to the system for which they are responsible as deemed needed and in the case of Contracting Parties, also act as a liaison with the Secretariat in order to solve security matters.

Conservation Measure 10–05 (2005)

Catch Documentation Scheme for *Dissostichus* spp.

Species Toothfish
Season all
Season all
Gear all

The Commission,

Concerned that illegal, unreported and unregulated (IUU) fishing for *Dissostichus* spp. In the Convention Area threatens serious depletion of populations of *Dissostichus* spp.,

Aware that IUU fishing involves significant by-catch of some Antarctic species, including endangered albatross,

Noting that IUU fishing is inconsistent with the objective of the Convention and undermines the effectiveness of CCAMLR conservation measures,

Underlining the responsibilities of Flag States to ensure that their vessels conduct their fishing activities in a responsible manner,

Mindful of the rights and obligations of Port States to promote the effectiveness of regional fishery conservation measures,

Aware that IUU fishing reflects the high value of, and resulting expansion in markets for and international trade in, *Dissostichus* spp.,

Recalling that Contracting Parties have agreed to introduce classification codes for *Dissostichus* spp. at a national level,

Recognising that the implementation of a Catch Documentation Scheme for *Dissostichus* spp. (CDS) will provide the Commission with essential information necessary to provide the precautionary management objectives of the Convention,

Committed to take steps, consistent with international law, to identify the origins of *Dissostichus* spp. entering the markets of Contracting Parties and to determine whether *Dissostichus* spp. harvested in the Convention Area that is imported into their territories was caught in a manner consistent with CCAMLR conservation measures,

Wishing to reinforce the conservation measures already adopted by the Commission with respect to *Dissostichus* spp.,

Inviting non-Contracting Parties whose vessels fish for *Dissostichus* spp. to participate in the CDS, hereby adopts the following conservation measure in accordance with Article IX of the Convention:

1. The following definitions are intended only for the purposes of the completion of CDS documents and shall be applied as stated regardless of whether such actions as landings, transhipments, imports, exports or re-exports constitute the same under any CDS participant's customs law or other domestic legislation:

(i) Port State: The State that has control over a particular port area or free trade zone for the purposes of landing, transhipment, importing, exporting and re-exporting and whose authority serves as the authority for landing or transhipment certification.

(ii) Landing: The initial transfer of catch in its harvested or processed form from a vessel to dockside or to another vessel in a port or free trade zone where the catch is certified by an authority of the Port State as landed.

(iii) Export: Any movement of a catch in its harvested or processed form from territory under the control of the State or free trade zone of landing, or, where that State or free trade zone forms part of a customs union, any other member State of that customs union.

(iv) Import: The physical entering or bringing of a catch into any part of the geographical territory under the control of a State, except where the catch is landed or transhipped within the definitions of 'landing' or 'transhipment' in this conservation measure.

(v) Re-export: Any movement of a catch in its harvested or processed form from territory under the control of a State, free trade zone, or member State of a customs union of import unless that State, free trade zone, or any member State of that customs union of import is the first place of import, in which case the movement is an export within the definition of 'export' in this conservation measure.

(vi) Transhipment: The transfer of a catch in its harvested or processed form from a vessel to another vessel or means of transport, and, where such transfer takes place within the territory under the control of a Port State, for the purpose of effecting its removal from that State. For the avoidance of doubt, temporarily placing a catch on land or an artificial structure to facilitate such transfer shall not prevent the transfer from being a transshipment where the catch is not 'landed' within the definition of 'landing' in this conservation measure.

2. Each Contracting Party shall take steps to identify the origin of *Dissostichus* spp. imported into or exported from its territories and to determine whether *Dissostichus* spp. harvested in the Convention Area that is imported into or exported from its territories was caught in a manner consistent with CCAMLR conservation measures.

3. Each Contracting Party shall require that each master or authorized representative flag vessels authorized to engage in harvesting of *Dissostichus* eleginoides and/or *Dissostichus* mawsoni complete a *Dissostichus* catch document (DCD) for the catch landed or transshipped on each occasion that it lands or transships *Dissostichus* spp.

4. Each Contracting Party shall require that each landing of *Dissostichus* spp. at its ports and each transshipment of *Dissostichus* spp. to its vessels be accompanied by a completed DCD. The landing of *Dissostichus* spp. without a catch document is prohibited.

5. Each Contracting Party shall, in accordance with their laws and regulations, require that their flag vessels which intend to harvest *Dissostichus* spp., including on the high seas outside the Convention Area, are provided with specific authorisation to

do so. Each Contracting Party shall provide DCD forms to each of its flag vessels authorised to harvest *Dissostichus* spp. and only to those vessels.

6. A non-Contracting Party seeking to cooperate with CCAMLR by participating in this scheme may issue DCD forms, in accordance with the procedures specified in paragraphs 7 and 8, to any of its flag vessels that intend to harvest *Dissostichus* spp.

7. The DCD shall include the following information:

(i) The name, address, telephone and fax numbers of the issuing authority;

(ii) The name, home port, national registry number and call sign of the vessel and, if issued, its IMO/Lloyd's registration number;

(iii) The reference number of the license or permit, whichever is applicable, that is issued to the vessel;

(iv) The weight of each *Dissostichus* species landed or transhipped by product type, and (a) by CCAMLR statistical subarea or division if caught in the Convention Area; and/or (b) by FAO statistical area, subarea or division if caught outside the Convention Area;

(v) The dates within which the catch was taken;

(vi) The date and the port at which the catch was landed or the date and the vessel, its flag and national registry number, to which the catch was transshipped;

(vii) The name, address, telephone and fax numbers of the recipient(s) of the catch and the amount of each species and product type received.

8. Procedures for completing DCDs in respect of vessels are set forth in paragraphs A1 toA10 of Annex 10–05/A to this measure. The standard catch document is attached to the annex.

9. Each Contracting Party shall require that each shipment of *Dissostichus* spp. Imported into or exported from its territory be accompanied by the export-validated DCD(s) and, where appropriate, validated re-export document(s) that account for all the *Dissostichus* spp. contained in the shipment. The import, export or re-export of *Dissostichus* spp. without a catch document is prohibited.

10. An export-validated DCD issued in respect of a vessel is one that:

(i) Includes all relevant information and signatures provided in accordance with paragraphs A1 to A11 of Annex 10–05/A to this measure;

(ii) Includes a signed and stamped certification by a responsible official of the exporting State of the accuracy of the information contained in the document.

11. Each Contracting Party shall ensure that its customs authorities or other appropriate officials request and examine the documentation of each shipment of *Dissostichus* spp. imported into or exported from its territory to verify that it includes the export-validated DCD(s) and, where appropriate, validated re-export document(s) that account for all the *Dissostichus* spp. contained in the shipment. These officials may also examine the content of any shipment to verify the information contained in the catch document or documents.

12. If, as a result of an examination referred to in paragraph 11 above, a question arises regarding the information contained in a DCD or a re-export document, the exporting State whose national authority validated the document(s) and, as appropriate, the Flag State whose vessel completed the document are called on to cooperate with the importing State with a view to resolving such question.

13. Each Contracting Party shall promptly provide by the most rapid electronic means, copies to the CCAMLR Secretariat of all export-validated DCDs and, where relevant, validated re-export documents that it issued from and received into its territory and shall submit annually to the Secretariat a summary list of documents issued from or received into its territory in respect of transhipments, landings, exports, re-exports and imports. The list shall include: Document identification numbers; date of landing, export, reexport, import; weights landed, exported, re-exported or imported.

14. Each Contracting Party, and any non-Contracting Party that issues DCDs in respect of its flag vessels in accordance with paragraph 6, shall inform the CCAMLR Secretariat of the national authority or authorities (including names, addresses, phone and fax numbers and email addresses) responsible for issuing and validating DCDs.

15. Notwithstanding the above, any Contracting Party, or any non-Contracting Party participating in the CDS, may require additional verification of catch documents by Flag States by using, inter alia, VMS, in respect of catches [1] taken on the high seas outside the Convention Area, when landed at, imported into or exported from its territory.

16. If, following an examination under paragraph 11, questions under paragraph 12 or requests for additional verification of documents under paragraph 15, it is determined, after consultation with the States concerned, that a catch document is invalid, the import, export or re-export of *Dissostichus* spp. being the subject of the document is prohibited.

17. If a Contracting Party participating in the CDS has cause to sell or dispose of seized or confiscated *Dissostichus* spp., it may issue a Specially Validated *Dissostichus* Catch Document (SVDCD) specifying the reasons for that validation. The SVDCD shall include a statement describing the circumstances under which confiscated fish are moving in trade. To the extent practicable, Parties shall ensure that no financial benefit arising from the sale of seized or confiscated catch accrue to the perpetrators of IUU fishing. If a Contracting Party issues a SVDCD, it shall immediately report all such validations to the Secretariat for conveying to all Parties and, as appropriate, recording in trade statistics.

18. A Contracting Party may transfer all or part of the proceeds from the sale of seized or confiscated *Dissostichus* spp. into the CDS Fund created by the Commission or into a national fund which promotes achievement of the objectives of the Convention. A Contracting Party may, consistent with its domestic legislation, decline to provide a market for toothfish offered for sale with a SVDCD by another State. Provisions concerning the uses of the CDS Fund are found in Annex 10–05/B.

[1] Excluding by-catches of *Dissostichus* spp. by trawlers fishing on the high seas outside the Convention Area. A by-catch shall be defined as no more than 5% of total catch of all species and no more than 50 tonnes for an entire fishing trip by a vessel.

Annex 10–05/A

A1. Each Flag State shall ensure that each *Dissostichus* catch document form that it issues includes a specific identification number consisting of:

(i) A four-digit number, consisting of the two-digit International Standards Organization (ISO) country code plus the last two digits of the year for which the form is issued;

(ii) A three-digit sequence number (beginning with 001) to denote the order in which catch document forms are issued. It shall also enter on each *Dissostichus* catch document form the number as appropriate of the license or permit issued to the vessel.

A2. The master of a vessel which has been issued a *Dissostichus* catch document form or forms shall adhere to the following procedures prior to each landing or transhipment of *Dissostichus* spp.:

(i) The master shall ensure that the information specified in paragraph 7 of

this conservation measure is accurately recorded on the *Dissostichus* catch document form;

(ii) If a landing or transhipment includes catch of both *Dissostichus* spp., the master shall record on the *Dissostichus* catch document form the total amount of the catch landed or transhipped by weight of each species;

(iii) If a landing or transhipment includes catch of *Dissostichus* spp. taken from different statistical subareas and/or divisions, the master shall record on the *Dissostichus* catch document form the amount of the catch by weight of each species taken from each statistical subarea and/or division and indicating whether the catch was caught in an EEZ or on the high seas, as appropriate;

(iv) The master shall convey to the Flag State of the vessel by the most rapid electronic means available, the *Dissostichus* catch document number, the dates within which the catch was taken, the species, processing type or types, the estimated weight to be landed and the area or areas of the catch, the date of landing or transhipment and the port and country of landing or vessel of transhipment and shall request from the Flag State, a Flag State confirmation number.

A3. If, for catches [1] taken in the Convention Area or on the high seas outside the Convention Area, the Flag State verifies, by the use of a VMS (as described in paragraph 1 of Conservation Measure 10–04), the area fished and that the catch to be landed or transhipped as reported by its vessel is accurately recorded and taken in a manner consistent with its authorisation to fish, it shall convey a unique Flag State confirmation number to the vessel's master by the most rapid electronic means available. The *Dissostichus* catch document will receive a confirmation number from the Flag State, only when it is convinced that the information submitted by the vessel fully satisfies the provisions of this conservation measure.

A4. The master shall enter the Flag State confirmation number on the *Dissostichus* catch document form.

A5. The master of a vessel that has been issued a *Dissostichus* catch document form or forms shall adhere to the following procedures immediately after each landing or transhipment of *Dissostichus* spp.:

(i) In the case of a transhipment, the master shall confirm the transhipment obtaining the signature on the *Dissostichus* catch document of the master of the vessel to which the catch is being transferred;

(ii) In the case of a landing, the master or authorised representative shall confirm the landing by obtaining a signed and stamped certification on the *Dissostichus* catch document by a responsible official of the Port State of landing or free trade zone who is acting under the direction of either the customs or fisheries authority of the Port State and is competent with regard to the validation of *Dissostichus* catch documents;

(iii) In the case of a landing, the master or authorised representative shall also obtain the signature on the *Dissostichus* catch document of the individual that receives the catch at the port of landing or free trade zone;

(iv) In the event that the catch is divided upon landing, the master or authorised representative shall present a copy of the *Dissostichus* catch document to each individual that receives a part of the catch at the port of landing or free trade zone, record on that copy of the catch document the amount and origin of the catch received by that individual and obtain the signature of that individual.

A6. In respect of each landing or transhipment, the master or authorised representative shall immediately sign and convey by the most rapid electronic means available a copy, or, if the catch landed was divided, copies, of the signed *Dissostichus* catch document to the Flag State of the vessel and shall provide a copy of the relevant document to each recipient of the catch.

A7. The Flag State of the vessel shall immediately convey by the most rapid electronic means available a copy or, if the catch was divided, copies, of the signed *Dissostichus* catch document to the CCAMLR Secretariat to be made available by the next working day to all Contracting Parties.

A8. The master or authorised representative shall retain the original copies of the signed *Dissostichus* catch document(s) and return them to the Flag State no later than one month after the end of the fishing season.

A9. The master of a vessel to which catch has been transhipped (receiving vessel) shall adhere to the following procedures immediately after each landing of such catch in order to complete each *Dissostichus* catch document received from transhipping vessels:

(i) The master of the receiving vessel shall confirm the landing by obtaining a signed and stamped certification on the *Dissostichus* catch document by a responsible official of the Port State of landing or free trade zone who is acting under the direction of either the customs or fisheries authority of the Port State and is competent with regard to the validation of *Dissostichus* catch documents;

(ii) The master of the receiving vessel shall also obtain the signature on the *Dissostichus* catch document of the individual that receives the catch at the port of landing or free trade;

(iii) In the event that the catch is divided upon landing, the master of the receiving vessel shall present a copy of the *Dissostichus* catch document to each individual that receives a part of the catch at the port of landing or free trade zone, record on that copy of the catch document the amount and origin of the catch received by that individual and obtain the signature of that individual.

A10. In respect of each landing of transhipped catch, the master or authorised representative of the receiving vessel shall immediately sign and convey by the most rapid electronic means available a copy of all the *Dissostichus* catch documents, or if the catch was divided, copies, of all the *Dissostichus* catch documents, to the Flag State(s) that issued the *Dissostichus* catch document, and shall provide a copy of the relevant document to each recipient of the catch. The Flag State of the receiving vessel shall immediately convey by the most rapid electronic means available a copy of the document to the CCAMLR Secretariat to be made available by the next working day to all Contracting Parties.

A11. For each shipment of *Dissostichus* spp. to be exported from the country of landing, the exporter shall adhere to the following procedures to obtain the necessary export validation of the *Dissostichus* catch document(s) that account for all the *Dissostichus* spp. contained in the shipment:

(i) The exporter shall enter on each *Dissostichus* catch document the amount of each *Dissostichus* spp. reported on the document that is contained in the shipment;

(ii) The exporter shall enter on each *Dissostichus* catch document the name and address of the importer of the shipment and the point of import;

(iii) The exporter shall enter on each *Dissostichus* catch document the exporter's name and address, and shall sign the document;

(iv) The exporter shall obtain a signed and stamped validation of the *Dissostichus* catch document (including the attachments if provided) by a responsible official of the exporting State.

(v) The exporter shall indicate the transport details as appropriate: If by sea container(s) number(s) if appropriate, or vessel name, and Bill of lading number, date and place of issue; if by air Flight

number, airway bill number, place and date of issue; If by other means (ground transportation) truck registration number and nationality, railway transport number, date and place of issue.

A12. In the case of re-export, the re-exporter shall adhere to the following procedures to obtain the necessary re-export validation of the *Dissostichus* catch document(s) that account for all the *Dissostichus* spp. contained in the shipment:

(i) The re-exporter shall supply details of the net weight of product of all species to be re-exported, together with the *Dissostichus* catch document number to which each species and product relates;

(ii) The re-exporter shall supply the name and address of the importer of the shipment, the point of import and the name and address of the exporter;

(iii) The re-exporter shall obtain a signed and stamped validation of the above details by the responsible official of the exporting State on the accuracy of information contained in the document(s);

(iv) The re-exporter shall indicate the transport details as appropriate: if by sea container(s) number(s) if appropriate, or vessel name, and bill of lading number, date and place of issue;

If by air flight number, airway bill number, place and date of issue;

If by other means (ground transportation) truck registration number and nationality, railway transport number, date and place of issue.

(v) The responsible official of the re-exporting State shall immediately transmit by the most rapid electronic means a copy of the re-export document to the Secretariat to be made available next working day to all Contracting Parties. The standard form for re-export is attached to this annex.

[1] Excluding by-catches of *Dissostichus* spp. by trawlers fishing on the high seas outside the Convention Area. A by-catch shall be defined as no more than 5% of total catch of all species and no more than 50 tonnes for an entire fishing trip by a vessel.

Dissostichus Catch Document V 1.5

Document Number Flag State Confirmation Number
Production Section
1. Issuing Authority of Document
Name Address Tel:
Fax:
2. Fishing Vessel Name Home Port & Registration Number Call Sign IMO/ Lloyd's Number (if issued)
3. Licence Number (if issued) Fishing dates for catch under this document
4. From:
5. To:
6. Description of Fish (Landed/Transhipped)
7. Description of Fish Sold
Species Type Estimated
Weight to be
Landed (kg)
Area
Caught *
Verified
Weight
Landed (kg)
Net Weight
Sold (kg)
Recipient name, address, telephone, fax and signature.
Recipient Name:
Signature:
Address:
Tel:
Fax:
Species: TOP *Dissostichus* eleginoides, TOA *Dissostichus* mawsoni
Type: WHO Whole; HAG Headed and gutted; HAT Headed and tailed; FLT Fillet; HGT Headed, gutted, tailed; OTH Other (specify)
8. Landing/Transhipment Information: I certify that the above information is complete, true and correct. If any *Dissostichus* spp. was taken in the Convention Area, I certify that it was taken in a manner which is consistent with CCAMLR conservation measures:
Master of Fishing Vessel or Authorised Representative (print in block letters)
Signature and Date Landing/Transhipment
Port and Country/Area
Date of Landing/Transhipment
9. Certificate of Transhipments: I certify that the above information is complete, true and correct to the best of my knowledge.
Master of Receiving Vessel Signature
Vessel Name Call Sign IMO/Lloyds Number (if issued)
Transhipment within a Port Area: countersignature by Port Authority if appropriate.
Name Authority Signature Seal (Stamp)
10. Certificate of Landing: I certify that the above information is complete, true and correct to the best of my knowledge.
Name Authority Signature Address Tel., Port of Landing Date of Landing Seal (Stamp)
11. Export Section—Transport Details
If by sea/air: Container number (if more than one—attach list).
If no container: Vessel name; or
Flight number; and
Bill of lading/airway bill number; and
Date and place of issue
If ground transport: Truck registration number and nationality; or
Railway transport number: and
Date and place of issue
12. Exporter Declaration: I certify that the above information is complete, true and correct to the best of my knowledge.
Species Product
Type
Net Weight Name Address Signature
Export Licence (if issued)
13. Export Government Authority
Validation: I certify that the above information is complete, true and correct to the best of my knowledge.
Name/Title Signature Date Country of export seal (Stamp)
14. Import Section
Name of Importer Address
Point of Unlading: Address State/Province Country City
*Report FAO Statistical Area/Subarea/ Division where catch was taken and indicate whether the catch was taken on the high seas or within an EEZ.

Dissostichus Re-Export Document V1.2

Re-Export Section Re-exporting Country:
1. Description of Fish
Species Type of Product Net Weight
Exported (kg)
Dissostichus Catch Document
Number Attached
Species: TOP *Dissostichus* eleginoides, TOA *Dissostichus* mawsoni
Type: WHO Whole; HAG Headed and gutted; HAT Headed and tailed; FLT
Fillet; HGT Headed, gutted, tailed; OTH
Other (specify)

Re-Export—Transport Details

If by sea/air: Container number (if more than one—attach list)
If no container: Vessel name; or
Flight number; and
Bill of lading/airway bill number; and
Date and place of issue
If ground transport: Truck registration number and nationality; or
Railway transport number: and
Date and place of issue
2. Re-Exporter Certification: I certify that the above information is complete, true and correct to the best of my knowledge and that the above product comes from product certified by the attached *Dissostichus* Catch Document(s).
Name Address Signature Date Export Licence (if issued)
3. Re-Export Government Authority Validation: I certify that the above information is complete, true, and correct to the best of my knowledge.
Name/Title Signature Date Seal (Stamp)
4. Import Section
Name of Importer Address
Point of Unlading: City State/Province Country

Annex 10–05/B

The Use of the CDS Fund

B1. The purpose of the CDS Fund (''the Fund'') is to enhance the capacity of the Commission in improving the effectiveness of the CDS and by this, and other means, to prevent, deter and eliminate IUU fishing in the Convention Area,

B2. The Fund will be operated according to the following provisions:

(i) Fund shall be used for special projects, or special needs of the Secretariat if the Commission so decides, aimed at assisting the development and improving the effectiveness of the CDS. The Fund may also be used for special projects and other activities contributing to the prevention, deterrence and elimination of IUU fishing in the Convention Area, and for other such purposes as the Commission may decide.

(ii) The Fund shall be used primarily for projects conducted by the Secretariat, although the participation of Members in these projects is not precluded. While individual Member projects may be considered, this shall not replace the normal responsibilities of Members of the Commission. The Fund shall not be used for routine Secretariat activities.

(iii) Proposals for special projects may be made by Members, by the Commission or the Scientific Committee and their subsidiary bodies, or by the Secretariat. Proposals shall be made to the Commission in writing and be accompanied by an explanation of the proposal and an itemized statement of estimated expenditure.

(iv) The Commission will, at each annual meeting, designate six Members to serve on a Review Panel to review proposals made intersessionally and to make recommendations to the Commission on whether to fund special projects or special needs. The Review Panel will operate by e-mail intersessionally and meet during the first week of the Commission's annual meeting.

(v) The Commission shall review all proposals and decide on appropriate projects and funding as a standing agenda item at its annual meeting.

(vi) The Fund may be used to assist Acceding States and non-Contracting Parties that wish to cooperate with CCAMLR and participate in the CDS, so long as this use is consistent with provisions (i) and (ii) above. Acceding States and non-Contracting Parties may submit proposals if the proposals are sponsored by, or in cooperation with, a Member.

(vii) The Financial Regulations of the Commission shall apply to the Fund, except in so far as these provisions provide or the Commission decides otherwise.

(viii) The Secretariat shall report to the annual meeting of the Commission on the activities of the Fund, including its income and expenditure. Annexed to the report shall be reports on the progress of each project being funded by the Fund, including details of the expenditure on each project. The report will be circulated to Members in advance of the annual meeting.

(ix) Where an individual Member project is being funded according to provision (ii), that Member shall provide an annual report on the progress of the project, including details of the expenditure on the project. The report shall be submitted to the Secretariat in sufficient time to be circulated to Members in advance of the annual meeting. When the project is completed, that Member shall provide a final statement of account certified by an auditor acceptable to the Commission.

(x) The Commission shall review all ongoing projects at its annual meeting as a standing agenda item and reserves the right, after notice, to cancel a project at any time should it decide that it is necessary. Such a decision shall be exceptional, and shall take into account progress made to date and likely progress in the future, and shall in any case be preceded by an invitation from the Commission to the project coordinator to present a case for continuation of funding.

(xi) The Commission may modify these provisions at any time.

Conservation Measure 10–06 (2005)

Scheme to Promote Compliance by Contracting Party Vessels With CCAMLR Conservation Measures

Species all
Area all
Season all
Gear all

The Commission,

Convinced that illegal, unreported and unregulated (IUU) fishing compromises the objective of the Convention,

Aware that a number of vessels registered to Parties and non-Parties are engaged in activities which diminish the effectiveness of CCAMLR conservation measures, Recalling that Contracting Parties are required to cooperate in taking appropriate action to deter any activities which are not consistent with the objective of the Convention, Resolved to reinforce its integrated administrative and political measures aimed at eliminating IUU fishing in the Convention Area, hereby adopts the following conservation measure in accordance with Article IX.2(i) of the Convention:

1. At each annual meeting, the Commission will identify those Contracting Parties whose vessels have engaged in fishing activities in the Convention Area in a manner which has diminished the effectiveness of CCAMLR conservation measures in force, and shall establish a list of such vessels (CP–IUU Vessel List), in accordance with the procedures and criteria set out hereafter.

2. This identification shall be documented, inter alia, on reports relating to the application of Conservation Measure 10–03, trade information obtained on the basis of the implementation of Conservation Measure 10–05 and relevant trade statistics such as Food and Agriculture Organization of the United Nations (FAO) and other national or international verifiable statistics, as well as any other information obtained from Port States and/or gathered from the fishing grounds which is suitably documented.

3. Where a Contracting Party obtains information that vessels flying the flag of another Contracting Party have engaged in activities set out in paragraph 5, it shall submit a report containing this information, within 30 days of having become aware of it, to the Executive Secretary and the Contracting Party concerned. Contracting Parties shall indicate that the information is provided for the purposes of considering whether to include the vessel concerned in the CP–IUU Vessel List under Conservation Measure 10–06. The Executive Secretary shall within one business day circulate the report to the other Contracting Parties and to non-Contracting Parties cooperating with the Commission by participating in the Catch Documentation Scheme for *Dissostichus* spp. (CDS), and invite them to communicate any information available to them in respect of the vessels referred to above, including their ownership, operators and their trade activities.

4. For the purposes of this conservation measure, the Contracting Parties are considered as having carried out fishing activities that have diminished the effectiveness of the conservation measures adopted by the Commission if:

(i) The Parties do not ensure compliance by their vessels with the conservation measures adopted by the Commission and in force, in respect of the fisheries in which they participate that are placed under the competence of CCAMLR;

(ii) Their vessels are repeatedly included in the CP–IUU Vessel List.

5. In order for a Contracting Party's vessel to be included in the CP–IUU Vessel List there must be evidence, gathered in accordance with paragraphs 2 and 3, that the vessel has:

(i) Engaged in fishing activities in the CCAMLR Convention Area without a licence issued in accordance with Conservation Measure 10–02, or in violation of the conditions under which such licence would have been issued in relation to authorised areas, species and time periods; or

(ii) Not recorded or not declared its catches made in the CCAMLR Convention Area in accordance with the reporting system applicable to the fisheries it engaged in, or made false declarations; or

(iii) Fished during closed fishing periods or in closed areas in contravention of CCAMLR conservation measures; or

(iv) Used prohibited gear in contravention of applicable CCAMLR conservation measures; or

(v) Transhipped or participated in joint fishing operations with, supported or re-supplied other vessels identified by CCAMLR as carrying out IUU fishing activities (i.e. vessels on the CP–IUU Vessel List or the NCP–IUU Vessel List established under Conservation Measure 10–07); or

(vi) Failed to provide, when required under Conservation Measure 10–05, a valid catch document for *Dissostichus* spp.; or

(vii) Engaged in fishing activities in a manner that undermines the attainment of the objectives of the Convention in waters adjacent to islands within the area to which the Convention applies over which the existence of State sovereignty is recognised by all Contracting Parties, in the terms of the statement made by the Chairman on 19 May 1980; or

(viii) Engaged in fishing activities contrary to any other CCAMLR conservation measures in a manner that undermines the attainment of the objectives of the Convention according to Article XXII of the Convention.

Draft CP–IUU Vessel List

6. The Executive Secretary shall, before 1 July of each year, draw up a draft list of Contracting Party vessels (the Draft CP–IUU Vessel List), listing all Contracting Party vessels that, on the basis of the information gathered in accordance with paragraphs 2 and 3, and any other information that the Executive Secretary might have obtained in relation thereto, and the criteria defined in paragraph 4, might be presumed to have engaged in any of the activities referred to in paragraph 5 during the period beginning 30 days before the start of the previous CCAMLR annual meeting. The Draft CP–IUU Vessel List shall be distributed immediately to the Contracting Parties concerned.

7. Contracting Parties whose vessels are included in the Draft CP–IUU Vessel List shall transmit their comments to the Executive Secretary before 1 September, including verifiable VMS data and other supporting information showing that the vessels listed have not engaged in the activities which led to their inclusion in the Draft CP–IUU Vessel List.

Provisional CP–IUU Vessel List

8. The Executive Secretary shall create a new list (''the Provisional CP–IUU Vessel List'') which shall comprise the Draft CP–IUU Vessel List and all information received pursuant to paragraph 7. Before 1 October, the Executive Secretary shall transmit the Provisional CP–IUU Vessel List, the CP–IUU Vessel List agreed at the previous CCAMLR annual meeting, and any evidence or documented information received since that meeting regarding vessels on the Provisional CP–IUU Vessel List and CP–IUU Vessel List to all Contracting Parties and non-Contracting Parties cooperating with the Commission by participating in the CDS. The Executive Secretary shall at the same time:

(i) Request non-Contracting Parties cooperating with the Commission by participating in the CDS that, to the extent possible in accordance with their applicable laws and regulations, they do not register or de-register vessels that have been placed on the Provisional CP–IUU Vessel List until such time as the Commission has had the opportunity to consider the List and has made its determination;

(ii) Invite non-Contracting Parties cooperating with the Commission by participating in the CDS to submit any evidence or documented information regarding vessels on the Provisional CP–IUU Vessel List and CP–IUU Vessel List, at the latest 30 days before the start of the next CCAMLR annual meeting. Where the incident occurs within the month preceding the next CCAMLR annual meeting, evidence or documented information should be provided as soon as possible.

9. Contracting Parties shall take all necessary measures, to the extent possible in accordance with their applicable laws and regulations, in order that:

(i) They do not register or de-register vessels that have been placed on the Provisional CP–IUU List until such time as the Commission has had the opportunity to examine the List and has made its determination;

(ii) If they do de-register a vessel on the Provisional CP–IUU Vessel List they inform, where possible, the Executive Secretary of the proposed new Flag State of the vessel, whereupon the Executive Secretary shall inform that State that the vessel is on the Provisional CP–IUU Vessel List and urge that State not to register the vessel.

Proposed and Final CP–IUU Vessel List

10. Contracting Parties shall submit to the Executive Secretary any additional information which might be relevant for the establishment of the CP–IUU Vessel List within 30 days of having become aware of such information and at the latest 30 days before the start of the CCAMLR annual meeting. A report containing this information shall be submitted in the format set out in paragraph 16, and Contracting Parties shall indicate that the information is provided for the purposes of considering whether to include the vessel concerned in the CP–IUU Vessel List under Conservation Measure 10–06. The Secretariat shall collate all information received and, where this has not been provided in relation to a vessel, attempt to obtain the information in paragraphs 16(i) to (viii).

11. The Executive Secretary shall circulate to Contracting Parties, at the latest 30 days before the start of the CCAMLR annual meeting, all evidence or documented information received under paragraphs 8 and 9, together with any other evidence or documented information received in terms of paragraphs 2 and 3.

12. At each CCAMLR annual meeting, the Standing Committee on Implementation and Compliance (SCIC) shall, by consensus:

(i) Adopt a Proposed CP–IUU Vessel List, following consideration of the Provisional CP–IUU Vessel List and information and evidence circulated under paragraph 10. The Proposed CP–IUU Vessel List shall be submitted to the Commission for approval;

(ii) Recommend to the Commission which, if any, vessels should be removed from the CP–IUU Vessel List adopted at the previous CCAMLR annual meeting, following consideration of that List and information and evidence circulated under paragraph 10.

13. SCIC shall include a vessel on the Proposed CP–IUU Vessel List only if one or more of the criteria in paragraph 5 have been satisfied.

14. SCIC shall recommend that the Commission should remove a vessel from the CP–IUU Vessel List if the Contracting Party proves that:

(i) The vessel did not take part in the activities described in paragraph 1 which led to the inclusion of the vessel in the CP–IUU Vessel List; or

(ii) It has taken effective action in response to the activities in question, including prosecution and imposition of sanctions of adequate severity; or

(iii) The vessel has changed ownership, including beneficial ownership if known to be distinct from the registered ownership, and that the new owner can establish the previous owner no longer has any legal, financial, or real interests in the vessel, or exercises control over it and that the new owner has not participated in IUU fishing; or

(iv) It has taken measures considered sufficient to ensure the granting of the right to the vessel to fly its flag will not result in IUU fishing.

15. In order to facilitate the work of SCIC and the Commission, the Executive Secretary shall prepare a paper for each CCAMLR annual meeting, summarising and annexing all the information, evidence and comments submitted in respect of each vessel to be considered.

16. The Draft CP–IUU Vessel List, Provisional CP–IUU Vessel List, Proposed CP–IUU Vessel List and the CP–IUU Vessel List shall contain the following details:

(i) Name of vessel and previous names, if any;

(ii) Flag of vessel and previous flags, if any;

(iii) Owner of vessel and previous owners, including beneficial owners, if any;

(iv) Operator of vessel and previous operators, if any;

(v) Call sign of vessel and previous call signs, if any;

(vi) Lloyds/IMO number;

(vii) Photographs of the vessel, where available;

(viii) Date vessel was first included on the CP–IUU Vessel List;

(ix) Summary of activities which justify inclusion of the vessel on the List, together with references to all relevant documents informing of and evidencing those activities.

17. On approval of the CP–IUU Vessel List, the Commission shall request Contracting Parties whose vessels appear thereon to take all necessary measures to address these activities, including if necessary, the withdrawal of the registration or of the fishing licences of these vessels, the nullification of the relevant catch documents and denial of further access to the CDS, and to inform the Commission of the measures taken in this respect.

18. Contracting Parties shall take all necessary measures, to the extent possible in accordance with their applicable laws and regulations, in order that:

(i) The issuance of a licence to vessels on the CP–IUU Vessel List to fish in the Convention Area is prohibited;

(ii) The issuance of a licence to vessels on the CP–IUU Vessel List to fish in waters under their fisheries jurisdiction is prohibited;

(iii) Fishing vessels, support vessels, mother-ships and cargo vessels flying their flag do not participate in any transhipment or joint fishing operations, support or resupply vessels on the CP–IUU Vessel List;

(iv) Vessels on the CP–IUU Vessel List that enter ports voluntarily are not authorized to land or tranship therein and are inspected in accordance with Conservation Measure 10–03 on so entering;

(v) The chartering of vessels on the CP–IUU Vessel List is prohibited;

(vi) Granting of their flag to vessels on the CP–IUU Vessel List is refused;

(vii) Imports, exports and re-exports of *Dissostichus* spp. from vessels on the CP–IUU Vessel List are prohibited;

(viii) 'Export or Re-export Government Authority Validation' is not certified when the shipment (of *Dissostichus* spp.) is declared to have been caught by any vessel on the CP–IUU Vessel List;

(ix) Importers, transporters and other sectors concerned are encouraged to refrain from dealing with and from transhipping of fish caught by vessels on the CP–IUU Vessel List;

(x) Any appropriate information which is suitably documented is collected and submitted to the Executive Secretary, to be forwarded to Contracting Parties, and non-Contracting Parties, entities or fishing entities cooperating with the Commission by participating in the CDS, with the aim of detecting, controlling and preventing the importation or exportation of, and other trade-related activities relating to, catches from vessels on the CP–IUU Vessel List intended to circumvent this conservation measure.

19. The Executive Secretary shall place the CP–IUU Vessel List approved by the Commission on the public section of the CCAMLR website. Furthermore, the Executive Secretary shall communicate the CP–IUU Vessel List to the FAO and appropriate regional fisheries organisations to enhance cooperation between CCAMLR and these organisations for the purposes of preventing, deterring and eliminating IUU fishing.

20. The Executive Secretary shall circulate to non-Contracting Parties cooperating with the Commission by participating in the CDS the CP–IUU Vessel List, together with the request that, to the extent possible in accordance with their applicable laws and regulations, they do not register vessels that have been placed on the List unless they are removed from the List by the Commission.

21. If Contracting Parties obtain new or changed information for vessels on the CP–IUU Vessel List in relation to the details in paragraphs 16(i) to (vii), they shall notify the Executive Secretary who shall place a notification on the secure section of the CCAMLR website and advise all Contracting Parties of the notification. If there are no comments on the information within seven (7) days, the Executive Secretary will revise the CP–IUU Vessel List.

22. Without prejudice to their rights to take proper action consistent with international law, Contracting Parties should not take any trade measures or other sanctions which are inconsistent with their international obligations against vessels using as the basis for the action the fact that the vessel or vessels have been included in the Draft CP–IUU Vessel List drawn up by the Executive Secretary, pursuant to paragraph 6.

23. The Chair of the Commission shall request the Contracting Parties identified pursuant to paragraph 1 to take all necessary measures to avoid diminishing the effectiveness of CCAMLR conservation measures resulting from their vessels' activities, and to advise the Commission of actions taken in that regard.

24. The Commission shall review, at subsequent CCAMLR annual meetings, as appropriate, action taken by those Contracting Parties to which requests have been made pursuant to paragraph 23, and identify those which have not rectified their activities.

25. The Commission shall decide appropriate measures to be taken in respect to *Dissostichus* spp. so as to address these issues with those identified Contracting Parties. In this respect, Contracting Parties may cooperate to adopt appropriate multilaterally agreed trade-related measures, consistent with their obligations as members of the World Trade Organization, that may be necessary to prevent, deter and eliminate the IUU activities identified by the Commission. Multilateral trade-related measures may be used to support cooperative efforts to ensure that trade in *Dissostichus* spp. and its products does not in any way encourage IUU fishing or otherwise diminish the effectiveness of CCAMLR's conservation measures which are consistent with the United Nations Convention on the Law of the Sea 1982.

Conservation Measure 10–07 (2005)

Scheme to Promote Compliance by Non-Contracting Party Vessels With CCAMLR Conservation Measures

Species all
Area all
Season all
Gear all

The Commission, convinced that illegal, unreported and unregulated (IUU) fishing compromises the objective of the Convention,

Aware that a significant number of vessels registered to non-Contracting Parties are engaged in activities which diminish the effectiveness of CCAMLR conservation measures, Recalling that Contracting Parties are required to cooperate in taking appropriate action to deter any activities which are not consistent with the objective of the Convention, Resolved to reinforce its integrated administrative and political measures aimed at eliminating IUU fishing in the Convention Area, hereby adopts the following conservation measure in accordance with Article IX.2(i) of the Convention:

1. The Contracting Parties request non-Contracting Parties to cooperate fully with the Commission with a view to ensuring that the effectiveness of CCAMLR conservation measures is not undermined.

2. At each annual meeting the Commission shall identify those non-Contracting Parties whose vessels are engaged in IUU fishing activities in the Convention Area that threaten to undermine the effectiveness of CCAMLR conservation measures, and shall establish a list of such vessels (NCP–IUU Vessel List), in accordance with the procedures and criteria set out hereafter.

3. This identification shall be documented, inter alia, on reports relating to the application of Conservation Measure 10–03, trade information obtained on the basis of the implementation of Conservation Measure 10–05 and relevant trade statistics such as Food and Agriculture Organization of the United Nations (FAO) and other national or international verifiable statistics, as well as any other information obtained from Port States and/or gathered from the fishing grounds which is suitably documented.

4. A non-Contracting Party vessel which has been sighted engaging in fishing activities in the Convention Area or which has been denied port access, landing or transhipment in accordance with Conservation Measure 10–03 is presumed to be undermining the effectiveness of CCAMLR conservation measures. In the case of any transshipment activities involving a sighted non-Contracting Party vessel inside or outside the Convention Area, the presumption of undermining the effectiveness of CCAMLR conservation measures applies to any other non-Contracting Party vessel which has engaged in such activities with that vessel.

5. When a non-Contracting Party vessel referred to in paragraph 4 enters a port of any Contracting Party, it shall be inspected by authorised Contracting Party officials in accordance with Conservation Measure 10–03 and shall not be allowed to land or tranship any fish species subject to CCAMLR conservation measures it might be holding on board unless the vessel establishes that the fish were caught in compliance with all relevant CCAMLR conservation measures and requirements under this Convention.

6. A Contracting Party which sights a non-Contracting Party vessel engaging in fishing activities in the Convention Area or denies a non-Contracting Party port access, landing or transhipment under paragraph 5 shall attempt to inform the vessel that it is presumed to be undermining the effectiveness of CCAMLR conservation measures, and that this information will be distributed to the Executive Secretary, all Contracting Parties and the Flag State of the vessel.

7. Information regarding such sightings or denial of port access, landings or transhipments, and the result of all inspections conducted in the ports of Contracting Parties, and any subsequent action shall be transmitted within one business day to the Commission in accordance with Article XXII of the Convention. The Executive Secretary shall transmit this information to all Contracting Parties, within one business day of receiving it, and to the Flag State of the vessel concerned as soon as possible and to appropriate regional fisheries organisations. At this time, the Executive Secretary shall, in consultation with the Chair of the Commission, request the Flag State concerned that, where appropriate, measures be taken in accordance with its applicable laws and regulations to ensure that the vessel desists from any activities that undermine the effectiveness of CCAMLR conservation measures, and that the Flag State report back to CCAMLR on the results of such enquiries and/or on the measures it has taken in respect of the vessel. The other Contracting Parties and non-Contracting Parties cooperating with the Commission by participating in the Catch Documentation Scheme for *Dissostichus* spp. (CDS) shall be invited to communicate any information available to them in respect of the vessels referred to above, including their ownership, operators and their trade activities.

8. Where a Contracting Party obtains information that a non-Contracting Party vessel has engaged in activities set out in paragraph 9, it shall submit a report containing this information, within 30 days of having become aware of it, to the Executive Secretary (including where such information has already been transmitted under paragraph 7). Contracting Parties shall indicate that the information is provided for the purposes of considering whether to include the vessel concerned in the NCP–IUU Vessel List under Conservation Measure 10–07. In addition, the Contracting Party may also submit the report directly to the non-Contracting Party concerned. The Executive Secretary shall promptly forward the information to the non-Contracting Party concerned, indicating that it has been provided for the purposes of considering whether to include the vessel concerned in the NCP–IUU Vessel List under Conservation Measure 10–07. The Executive Secretary shall request that the Flag State take action to prevent the vessel undertaking any activities that undermine the effectiveness of CCAMLR conservation measures and that the Flag State report back to CCAMLR on the measures it has taken in respect of the vessel concerned. The Executive Secretary shall circulate the information and any report from the Flag State to all other Contracting Parties as soon as possible.

9. In order for a non-Contracting Party's vessel to be included in the NCP–IUU Vessel List, there must be evidence, gathered in accordance with paragraphs 3 and 8, that the vessel has:

(i) Been sighted engaging in fishing activities in the CCAMLR Convention Area; or

(ii) Been denied port access, landing or transhipment in accordance with Conservation Measure 10–03; or

(iii) Transhipped or participated in joint fishing operations with, supported or resupplied other vessels identified by CCAMLR as carrying out IUU fishing activities (i.e. vessels on the NCP–IUU Vessel List or the CP–IUU Vessel List established under Conservation Measure 10–06); or

(iv) Failed to provide, when required under Conservation Measure 10–05, a valid catch document for *Dissostichus* spp.; or

(v) Engaged in fishing activities in a manner that undermines the attainment of the objectives of the Convention in waters adjacent to islands within the area to which the Convention applies over which the existence of State sovereignty is recognised by all Contracting Parties, in the terms of the statement made by the Chairman on 19 May 1980; or

(vi) Engaged in fishing activities contrary to any other CCAMLR conservation measures in a manner that undermines the attainment of the

objectives of the Convention according to Article XXII of the Convention.

Draft NCP–IUU Vessel List

10. The Executive Secretary shall, before 1 July of each year, draw up a draft list (''the Draft NCP–IUU Vessel List''), listing all non-Contracting Party vessels that, on the basis of the information gathered in accordance with paragraphs 3 and 8 and any other information that the Executive Secretary might have obtained in relation thereto, might be presumed to have engaged in any of the activities referred to in paragraph 9 during the period beginning 30 days before the start of the previous CCAMLR annual meeting. The Draft NCP–IUU Vessel List shall be distributed immediately to the non-Contracting Parties concerned and to all Contracting Parties.

11. The Executive Secretary shall invite non-Contracting Parties whose vessels are included in the Draft NCP–IUU Vessel List to transmit their comments to the Executive Secretary before 1 September, including verifiable VMS data and other supporting information showing that the vessels listed have not engaged in the activities which led to their inclusion in the Draft NCP–IUU Vessel List.

Provisional NCP–IUU Vessel List

12. The Executive Secretary shall create a new list ('the Provisional NCP–IUU Vessel List') which shall comprise the Draft NCP–IUU Vessel List and all information received pursuant to paragraph 11. Before 1 October, the Executive Secretary shall transmit the Provisional NCP–IUU Vessel List, the NCP–IUU Vessel List agreed at the previous CCAMLR annual meeting, and any evidence or documented information received since that meeting regarding vessels on the Provisional NCP–IUU Vessel List or the NCP–IUU Vessel List to all Contracting Parties and non-Contracting Parties cooperating with the Commission by participating in the CDS. The Executive Secretary shall at the same time:

(i) Request non-Contracting Parties cooperating with the Commission by participating in the CDS that, to the extent possible in accordance with their applicable laws and regulations, they do not register or de-register vessels that have been placed on the List until such time as the Commission has had the opportunity to consider the List and has made its determination;

(ii) Invite non-Contracting Parties cooperating with the Commission by participating in the CDS to submit any evidence or documented information regarding vessels on the Provisional NCP–IUU Vessel List and NCP–IUU Vessel List, at the latest 30 days before the start of the next CCAMLR annual meeting. Where the incident occurs within the month preceding the next CCAMLR annual meeting, evidence or documented information should be provided as soon as possible.

(iii) Transmit the Provisional NCP–IUU Vessel List and any evidence or documented information received regarding vessels on that List to all non-Contracting Parties whose vessels are included in the List and who are not non-Contracting Parties cooperating with the Commission by participating in the CDS.

13. Contracting Parties shall take all necessary measures, to the extent possible in accordance with their applicable laws and regulations, in order that:

(i) They do not register vessels that have been placed on the Provisional NCP–IUU Vessel List until such time as the Commission has had the opportunity to examine the List and has made its determination;

(ii) If they do de-register a vessel on the Provisional NCP–IUU Vessel List they inform, where possible, the Executive Secretary of the proposed new Flag State of the vessel, whereupon the Executive Secretary shall inform that State that the vessel is on the Provisional NCP–IUU Vessel List and urge that State not to register the vessel.

Proposed and Final NCP–IUU Vessel List

14. Contracting Parties shall submit to the Executive Secretary any additional information which might be relevant for the establishment of the NCP–IUU Vessel List within 30 days of having become aware of such information and at the latest 30 days before the start of the CCAMLR annual meeting. A report containing this information shall be submitted in the format set out in paragraph 20, and Contracting Parties shall indicate that the information is provided for the purposes of considering whether to include the vessel concerned in the NCP–IUU Vessel List under Conservation Measure 10–07. The Executive Secretary shall collate all information received and, where this has not been provided in relation to a vessel, attempt to obtain the information in paragraphs 20(i) to (vii).

15. The Executive Secretary shall circulate to Contracting Parties, at the latest 30 days before the start of the CCAMLR annual meeting, all evidence or documented information received under paragraphs 12 and 13, together with any other evidence or documented information received in terms of paragraphs 3 and 8.

16. At each CCAMLR annual meeting, the Standing Committee on Implementation and Compliance (SCIC) shall, by consensus:

(i) Adopt a Proposed NCP–IUU Vessel List, following consideration of The Provisional NCP–IUU Vessel List and information and evidence circulated under Paragraph14. The Proposed NCP–IUU Vessel List shall be submitted to the Commission for approval;

(ii) Recommend to the Commission which, if any, vessels should be removed from the NCP–IUU Vessel List adopted at the previous CCAMLR annual meeting, following consideration of that List and information and evidence circulated under paragraph 14.

17. SCIC shall include a vessel on the Proposed NCP–IUU Vessel List only if one or more of the criteria in paragraph 9 have been satisfied.

18. SCIC shall recommend that the Commission should remove a vessel from the NCP–IUU Vessel List if the non-Contracting Party proves that:

(i) The vessel did not take part in the activities described in paragraph 9 which led to the inclusion of the vessel in the NCP–IUU Vessel List; or

(ii) It has taken effective action in response to the activities in question, including prosecution and imposition of sanctions of adequate severity; or

(iii) The vessel has changed ownership including beneficial ownership if known to be distinct from the registered ownership and that the new owner can establish the previous owner no longer has any legal, financial, or real interests in the vessel, or exercises control over it and that the new owner has not participated in IUU fishing; or

(iv) It has taken measures considered sufficient to ensure the granting of the right to the vessel to fly its flag will not result in IUU fishing.

19. In order to facilitate the work of SCIC and the Commission, the Executive Secretary shall prepare a paper for each CCAMLR annual meeting, summarising and annexing all the information, evidence and comments submitted in respect of each vessel to be considered.

20. The Draft NCP–IUU Vessel List, Provisional NCP–IUU Vessel List, Proposed NCPIUU Vessel List and the NCP–IUU Vessel List shall contain the following details:

(i) Name of vessel and previous names, if any;

(ii) Flag of vessel and previous flags, if any;

(iii) Owner of vessel and previous owners including beneficial owners, if any;
(iv) Operator of vessel and previous operators, if any;
(v) Call sign of vessel and previous call signs, if any;
(vi) Lloyds/IMO number;
(vii) Photographs of the vessel, where available;
(viii) Date vessel was first included on the NCP–IUU Vessel List;
(ix) Summary of activities which justify inclusion of the vessel in the List, together with references to all relevant documents informing of and evidencing those activities.

21. On approval of the NCP–IUU Vessel List, the Commission shall request non-Contracting Parties whose vessels appear thereon to take all necessary measures to address these activities, including if necessary, the withdrawal of the registration or of the fishing licences of these vessels, the nullification of the relevant catch documents and denial of further access to the CDS, and to inform the Commission of the measures taken in this respect.

22. Contracting Parties shall take all necessary measures, to the extent possible in accordance with their applicable laws and regulations, in order that:
(i) The issuance of a licence to vessels on the NCP–IUU Vessel List to fish in waters under their fisheries jurisdiction is prohibited;
(ii) Fishing vessels, support vessels, mother-ships and cargo vessels flying their flag do not participate in any transhipment or joint fishing operations, support or resupply vessels on the NCP–IUU Vessel List;
(iii) Vessels on the NCP–IUU Vessel List that enter ports voluntarily are not authorized to land or tranship therein and are inspected in accordance with Conservation Measure 10–03 on so entering;
(iv) The chartering of vessels on the NCP–IUU Vessel List is prohibited;
(v) Granting of their flag to vessels on the NCP–IUU Vessel List is refused;
(vi) Imports, exports and re-exports of *Dissostichus* spp. from vessels on the NCP–IUU Vessel List are prohibited;
(vii) 'Export or Re-export Government Authority Validation' is not certified when the shipment (of *Dissostichus* spp.) is declared to have been caught by any vessel on the NCP–IUU Vessel List;
(viii) Importers, transporters and other sectors concerned are encouraged to refrain from dealing with and from transhipping of fish caught by vessels on the NCP–IUU Vessel List;
(ix) Any appropriate information which is suitably documented is collected and submitted to the Executive Secretary, to be forwarded to Contracting Parties and non-Contracting Parties, entities or fishing entities cooperating with the Commission by participating in the CDS, with the aim of detecting, controlling and preventing the importation or exportation of, and other trade-related activities relating to, catches from vessels on the NCP–IUU Vessel List intended to circumvent this conservation measure.

23. The Executive Secretary shall place the NCP–IUU Vessel List approved by the Commission on the public section of the CCAMLR website. Furthermore, the Executive Secretary shall communicate the NCP–IUU Vessel List to the FAO and appropriate regional fisheries organisations to enhance cooperation between CCAMLR and these organisations for the purposes of preventing, deterring and eliminating IUU fishing.

24. The Executive Secretary shall circulate to non-Contracting Parties cooperating with the Commission by participating in the CDS the NCP–IUU Vessel List, together with the request that, to the extent possible in accordance with their applicable laws and regulations, they do not register vessels that have been placed on the List unless they are removed from the List by the Commission.

25. If Contracting Parties obtain new or changed information for vessels on the NCP–IUU Vessel List in relation to the details in paragraphs 20(i) to (vii), they shall notify the Executive Secretary who shall place a notification on the secure section of the CCAMLR website and advise all Contracting Parties and the non-Contracting Party concerned of the notification. If there are no comments on the information within seven (7) days, the Executive Secretary will revise the NCP–IUU Vessel List.

26. Without prejudice to their rights to take proper action consistent with international law, Contracting Parties should not take any trade measures or other sanctions which are inconsistent with their international obligations against vessels using as the basis for the action the fact that the vessel or vessels have been included in the Draft NCP–IUU Vessel List drawn up by the Executive Secretary, pursuant to paragraph 10.

27. The Chair of the Commission shall request the non-Contracting Parties identified pursuant to paragraph 1 to take all necessary measures to avoid diminishing the effectiveness of CCAMLR conservation measures resulting from their vessels' activities, including if necessary withdrawal of a vessel's registration or fishing licence, nullification of the relevant CDS documents and denial of further access to the CDS, and to advise the Commission of actions taken in that regard.

28. Contracting Parties shall jointly and/or individually request non-Contracting Parties identified pursuant to paragraph 2 to cooperate fully with the Commission in order to avoid diminishing the effectiveness of conservation measures adopted by the Commission.

29. The Commission shall review, at subsequent CCAMLR annual meetings, as appropriate, action taken by those non-Contracting Parties to which requests have been made pursuant to paragraph 26, and identify those which have not rectified their activities.

30. The Commission shall decide appropriate measures to be taken in respect to *Dissostichus* spp. so as to address these issues with those identified non-Contracting Parties. In this respect, Contracting Parties may cooperate to adopt appropriate multilaterally agreed trade-related measures, consistent with their obligations as members of the World Trade Organization, that may be necessary to prevent, deter and eliminate the IUU activities identified by the Commission. Multilateral trade-related measures may be used to support cooperative efforts to ensure that trade in *Dissostichus* spp. and its products does not in any way encourage IUU fishing or otherwise diminish the effectiveness of CCAMLR's conservation measures which are consistent with the United Nations Convention on the Law of the Sea 1982.

Conservation Measure 21–02 (2005)[1 2]

Exploratory Fisheries

Species all
Area all
Season all
Gear all

The Commission,

Recognising that in the past, some Antarctic fisheries had been initiated and subsequently expanded in the Convention Area before sufficient information was available upon which to base management advice,

Agreeing that exploratory fishing should not be allowed to expand faster than the acquisition of information necessary to ensure that the fishery can and will be conducted in accordance with the principles set forth in Article II, hereby adopts the following conservation measure in accordance with Article IX of the Convention:

1. For the purposes of this conservation measure, exploratory fisheries are defined as follows:

(i) An exploratory fishery shall be defined as a fishery that was previously classified as a ''new fishery'', as defined by Conservation Measure 21–01;

(ii) An exploratory fishery shall continue to be classified as such until sufficient information is available:

(a) To evaluate the distribution, abundance, and demography of the target species, leading to an estimate of the fishery's potential yield;

(b) To review the fishery's potential impacts on dependent and related species;

(c) To allow the Scientific Committee to formulate and provide advice to the Commission on appropriate harvest catch levels, as well as effort levels and fishing gear, where appropriate.

2. To ensure that adequate information is made available to the Scientific Committee for evaluation, during the period when a fishery is classified as exploratory, the Scientific Committee shall develop (and update annually as appropriate) a Data Collection Plan, which should include research proposals, as appropriate. This shall identify the data needed and describe any operational research actions necessary to obtain the relevant data from the exploratory fishery to enable an assessment of the stock to be made.

3. The Data Collection Plan shall include, where appropriate:

(i) A description of the catch, effort, and related biological, ecological, and environmental data required to undertake the evaluations described in paragraph 1(ii), and the date by which such data are to be reported annually to CCAMLR;

(ii) A plan for directing fishing effort during the exploratory phase to permit the acquisition of relevant data to evaluate the fishery potential and the ecological relationships among harvested, dependent and related populations and the likelihood of adverse impacts;

(iii) Where appropriate, a plan for the acquisition of any other research data by fishing vessels, including activities that may require the cooperative activities of scientific observers and the vessel, as may be required for the Scientific Committee to evaluate the fishery potential and the ecological relationships among harvested, dependent and related populations and the likelihood of adverse impacts;

(iv) An evaluation of the time-scales involved in determining the responses of harvested, dependent and related populations to fishing activities.

4. The Commission shall annually determine a precautionary catch limit at a level not substantially above that necessary to obtain the information specified in the Data Collection Plan and required to undertake the evaluations described in paragraph 1(ii).

5. Any Member proposing to participate in an exploratory fishery shall:

(i) Notify its intention to the Commission not less than three months in advance of the next regular meeting of the Commission. This notification shall include the information prescribed in paragraph 4 of Conservation Measure 10–02 in respect of vessels proposing to participate in the fishery, with the exception that the notification shall not be required to specify the information referred to in subparagraph 4(ii) of Conservation Measure 10–02. Members shall, to the extent practicable, also provide in their notification the additional information detailed in paragraph 5 of Conservation Measure 10–02 in respect to each fishing vessel notified. Members are not hereby exempted from their obligations under Conservation Measure 10–02 to submit any necessary updates to vessel and licence details within the deadline established therein as of issuance of the licence to the vessel concerned;

(ii) Prepare and submit to CCAMLR by a specified date a Fishery Operations Plan for the fishing season, for review by the Scientific Committee and the Commission. The Fishery Operations Plan shall include as much of the following information as the Member is able to provide, so as to assist the Scientific Committee in its preparation of the Data Collection Plan:

(a) The nature of the exploratory fishery, including target species, methods of fishing, proposed region and maximum catch levels proposed for the forthcoming season;

(b) Biological information on the target species from comprehensive research/survey cruises, such as distribution, abundance, demographic data, and information on stock identity;

(c) Details of dependent and related species and the likelihood of their being affected by the proposed fishery;

(d) Information from other fisheries in the region or similar fisheries elsewhere that may assist in the evaluation of potential yield;

(iii) Provide a commitment, in its proposal, to implement any Data Collection Plan developed by the Scientific Committee for the fishery.

6. On the basis of the information submitted in accordance with paragraph 5, and taking into account the advice and evaluation provided by the Scientific Committee and the Standing Committee on Implementation and Compliance (SCIC), the Commission shall annually consider adoption of relevant conservation measures for each exploratory fishery.

7. The Commission shall not consider a notification by a Member unless the information required by paragraph 5 has been submitted by the due date.

8. Notwithstanding paragraph 7, Members shall be entitled under Conservation Measure 10–02 to authorise participation in an exploratory fishery a vessel other than that identified by the Commission in accordance with paragraph 5 if the notified vessel is prevented from participation due to legitimate operational or force majeure reasons. In such circumstances the Member concerned shall immediately inform the Secretariat thereof providing:

(i) Full details of the intended replacement vessel(s) as prescribed in subparagraph 5(i);

(ii) A comprehensive account of the reasons justifying the replacement and any relevant supporting evidence or references.

The Secretariat shall immediately circulate this information to all Members.

9. Members whose vessels participate in exploratory fisheries in accordance with paragraphs 5 and/or 8 shall:

(i) Ensure that their vessels are equipped and configured so that they can comply with all relevant conservation measures;

(ii) Ensure that each vessel carries a CCAMLR-designated scientific observer to collect data in accordance with the Data Collection Plan, and to assist in collecting biological and other relevant data;

(iii) Annually (by the specified date) submit to CCAMLR the data specified by the Data Collection Plan;

(iv) Be prohibited from continuing participation in the relevant exploratory fishing if the data specified in the Data Collection Plan have not been submitted to CCAMLR for the most recent season in which fishing occurred, until the relevant data have been submitted to CCAMLR and the Scientific Committee has been allowed an opportunity to review the data.

10. A vessel on either of the IUU Vessel Lists established under Conservation Measures 10–06 and 10–07 shall not be permitted to participate in exploratory fisheries.

11. Notifications for exploratory fisheries pursuant to the provisions above shall be subject to an administrative cost-recovery scheme and shall therefore be accompanied by

a payment per vessel, the amount and refundable component of which shall be decided by the Commission, as well as the conditions and modalities according to which such payment shall be made.

[1] Except for waters adjacent to the Kerguelen and Crozet Islands.

[2] Except for waters adjacent to the Prince Edward Islands.

Conservation Measure 23–01 (2005)

Five-day Catch and Effort Reporting System

Species all
Area various
Season all
Gear various

This conservation measure is adopted in accordance with Conservation Measure 31–01 where appropriate:

1. For the purposes of this Catch and Effort Reporting System the calendar month shall be divided into six reporting periods, viz: day 1 to day 5, day 6 to day 10, day 11 to day 15, day 16 to day 20, day 21 to day 25 and day 26 to the last day of the month. These reporting periods are hereinafter referred to as periods A, B, C, D, E and F.

2. At the end of each reporting period, each Contracting Party shall obtain from each of its vessels its total catch of all species, including by-catch species, and total days and hours fished for that period and shall, by facsimile or email, transmit the aggregated catch and days and hours fished for its vessels. The catch and effort data shall reach the Executive Secretary not later than two (2) working days after the end of the reporting period. In the case of longline fisheries, the number of hooks shall also be reported. In the case of pot fisheries, the number of pots shall also be reported.

3. A report must be submitted by every Contracting Party taking part in the fishery for each reporting period for the duration of the fishery even if no catches are taken. A Contracting Party may authorise each of its vessels to report directly to the Secretariat.

4. Such reports shall specify the month and reporting period (A, B, C, D, E or F) to which each report refers.

5. Immediately after the deadline has passed for receipt of the reports for each period, the Executive Secretary shall notify all Contracting Parties engaged in fishing activities in the area, of the total catch taken during the reporting period, the total aggregate catch for the season to date together with an estimate of the date upon which the total allowable catch is likely to be reached for that season. In the case of exploratory fisheries, the Executive Secretary shall also notify the total aggregate catch for the season to date in each small-scale research unit (SSRU) together with an estimate of the date upon which the total allowable catch is likely to be reached in each SSRU for that season. Estimates shall be based on a projection forward of the trend in daily catch rates, obtained using linear regression techniques from a number of the most recent catch reports.

6. At the end of every six reporting periods, the Executive Secretary shall inform all Contracting Parties of the total catch taken during the six most recent reporting periods, the total aggregate catch for the season to date together with an estimate of the date upon which the total allowable catch is likely to be reached for that season.

7. If the estimated date of completion of the total allowable catch is within five days of the date on which the Secretariat received the report of the catches, the Executive Secretary shall inform all Contracting Parties that the fishery will close on that estimated day or on the day on which the report was received, whichever is the later. In the case of exploratory fisheries, if the estimated date of completion of the catch in any SSRU is within five days of the day on which the Secretariat received the report of catches, the Executive Secretary shall additionally inform all Contracting Parties, and their relevant fishing vessels if so authorised, that fishing in that SSRU will be prohibited from that calculated day, or on the day on which the report was received, whichever is the later.

8. Should a Contracting Party, or where a vessel is authorised to report directly to the Secretariat, the vessel, fail to transmit a report to the Executive Secretary in the appropriate form by the deadline specified in paragraph 2, the Executive Secretary shall issue a reminder to the Contracting Party. If at the end of a further two five-day periods, or, in the case of exploratory fisheries, a further one five-day period, those data have still not been provided, the Executive Secretary shall notify all Contracting Parties of the closure of the fishery to the vessel which has failed to supply the data as required and the Contracting Party concerned shall require the vessel to cease fishing. If the Executive Secretary is notified by the Contracting Party that the failure of the vessel to report is due to technical difficulties, the vessel may resume fishing once the report or explanation concerning the failure has been submitted.

Conservation Measure 23–06 (2005)

Data Reporting System for Krill Fisheries

Species krill
Area all
Season all
Gear all

1. This conservation measure is invoked by the conservation measures to which it is attached.

2. Catches shall be reported in accordance with the monthly catch and effort reporting system set out in Conservation Measure 23–03 according to the statistical areas, subareas, divisions or any other area or unit specified with catch limits in Conservation Measures 51–01, 51–02 and 51–03.

3. At the end of each fishing season each Contracting Party shall obtain from each of its vessels the haul-by-haul data required to complete the CCAMLR fine-scale catch and effort data form (trawl fisheries Form C1). It shall transmit those data in the specified format to the Executive Secretary not later than 1 April of the following year.

Conservation Measure 24–01 (2005)[1 2]

The Application of Conservation Measures to Scientific Research

Species all
Area all
Season all
Gear all

This conservation measure governs the application of conservation measures to scientific research and is adopted in accordance with Article IX of the Convention.

1. General application:

(a) Catches taken by any vessel for research purposes will be considered as part of any catch limits in force for each species taken unless the catch limit in an area [3] is set at zero.

(b) In the event of research being undertaken in an area [3] with a zero catch limit, then the catches adopted under paragraphs 2 or 3 below shall be considered to be the catch limit for the season in that area. When such an area sits within a group of areas to which an overall catch limit applies, that overall catch limit shall not be exceeded including any catch taken for research purposes.

2. Application to Members taking less than 50 tonnes of finfish in a season including no more than the amounts specified for finfish taxa in Annex 24–01/B and less than 0.1% of a given catch limit for non-finfish taxa indicated in Annex 24–01/B:

(a) Any Member planning to use a vessel or vessels for research purposes

when the estimated seasonal catch is as above shall notify the Secretariat of the Commission which in turn will notify all Members immediately, according to the format provided in Annex 24–01/A.

(b) Vessels to which the provisions of paragraph 2(a) above apply, shall be exempt from conservation measures relating to mesh size regulations, prohibition of types of gear, closed areas, fishing seasons and size limits, and reporting system requirements other than those specified in paragraph 4 below.

3. Application to Members taking more than 50 tonnes of finfish or more than the amounts specified for finfish taxa in Annex 24–01/B or more than 0.1% of a given catch limit for non-finfish taxa indicated in Annex 24–01/B:

(a) Any Member planning to use any type of vessel or vessels to conduct fishing for research purposes when the estimated seasonal catch is as above, shall notify the Commission and provide the opportunity for other Members to review and comment on its research plan. The plan shall be provided to the Secretariat for distribution to Members at least six months in advance of the planned starting date for the research. In the event of any request for a review of such plan being lodged within two months of its circulation, the Executive Secretary shall notify all Members and submit the plan to the Scientific Committee for review. Based on the submitted research plan and any advice provided by the appropriate working group, the Scientific Committee will provide advice to the Commission where the review process will be concluded. Until the review process is complete the planned fishing for research purposes shall not proceed.

(b) Research plans shall be reported in accordance with the standardised guidelines and formats adopted by the Scientific Committee, given in Annex 24–01/A.

4. Reporting requirements for these research activities are:

(a) The CCAMLR within-season five-day reporting system shall apply.

(b) All research catches shall be reported to CCAMLR as part of the annual STATLANT returns.

(c) A summary of the results of any research subject to the above provisions shall be provided to the Secretariat within 180 days of the completion of the research fishing. A full report shall be provided within 12 months.

(d) Catch, effort and biological data resulting from research fishing should be reported to the Secretariat according to the haul-by-haul reporting format for research vessels (C4).

[1] Except for waters adjacent to the Kerguelen and Crozet Islands

[2] Except for waters adjacent to the Prince Edward Islands

[3] Any management area including subarea, division, management area or SSRU, whichever is designated as a zero catch limit.

Conservation Measure 24–02 (2005)

Longline Weighting for Seabird Conservation

Species seabirds
Area selected
Season all
Gear longline

In respect of fisheries in Statistical Subareas 48.6, 88.1 and 88.2 and Statistical Divisions 58.4.1, 58.4.2, 58.4.3a, 58.4.3b and 58.5.2, paragraph 4 of Conservation Measure 25–02 shall not apply only where a vessel can demonstrate its ability to fully comply with one of the following protocols.

Protocol A (for vessels monitoring longline sink rate with Time-Depth Recorders (TDRs) and using longlines to which weights are manually attached):

A1. Prior to entry into force of the licence for this fishery and once per fishing season prior to entering the Convention Area, the vessel shall, under observation by a scientific observer:

(i) Set a minimum of two longlines with a minimum of four TDRs on the middle one-third of each longline, where:

(a) For vessels using the auto longline system, each longline shall be at least 6 000 m in length;

(b) For vessels using the Spanish longline system, each longline shall be at least 16 000 m in length;

(c) For vessels using the Spanish longline system, with longlines less than 16 000 m in length, each longline shall be of the maximum length to be used by the vessel in the Convention Area;

(d) For vessels using a longline system other than an autoline or Spanish longline system, each longline shall be of the maximum length to be used by the vessel in the Convention Area.

(ii) Randomise TDR placement on the longline, noting that all tests should be applied midway between weights;

(iii) Calculate an individual sink rate for each TDR when returned to the vessel, where:

(a) The sink rate shall be measured as an average of the time taken for the longline to sink from the surface (0 m) to 15 m;

(b) This sink rate shall be at a minimum rate of 0.3 m/s;

(iv) If the minimum sink rate is not achieved at all eight sample points (four tests on two longlines), continue the testing until such time as a total of eight tests with a minimum sink rate of 0.3 m/s are recorded;

(v) All equipment and fishing gear used in the tests is to be to the same specifications as that to be used in the Convention Area.

A2. During fishing, for a vessel to be allowed to maintain the exemption to night-time setting requirements (paragraph 4 of Conservation Measure 25–02), regular longline sink monitoring shall be undertaken by the CCAMLR scientific observer. The vessel shall cooperate with the CCAMLR observer who shall:

(i) Attempt to conduct a TDR test on one longline set every twenty-four hour period;

(ii) Every seven days place at least four TDRs on a single longline to determine any sink rate variation along the longline;

(iii) Randomise TDR placement on the longline, noting that all tests should be applied halfway between weights;

(iv) Calculate an individual longline sink rate for each TDR when returned to the vessel;

(v) Measure the longline sink rate as an average of the time taken for the longline to sink from the surface (0 m) to 15 m.

A3. The vessel shall:

(i) Ensure that all longlines are weighted to achieve a minimum longline sink rate of 0.3 m/s at all times whilst operating under this exemption;

(ii) Report daily to its national agency on the achievement of this target whilst operating under this exemption;

(iii) Ensure that data collected from longline sink rate tests prior to entering the Convention Area and longline sink rate monitoring during fishing are recorded in the CCAMLR-approved format [1] and submitted to the relevant national agency and CCAMLR Data Manager within two months of the vessel departing a fishery to which this measure applies.

Protocol B (for vessels monitoring longline sink rate with bottle tests and using longlines to which weights are manually attached):

B1. Prior to entry into force of the licence for this fishery and once per fishing season prior to entering the Convention Area, the vessel shall, under observation by a scientific observer:

(i) Set a minimum of two longlines with a minimum of four bottle tests (see paragraphs B5 to B9) on the middle one-third of each longline, where:

(a) For vessels using the auto longline system, each longline shall be at least 6 000 m in length;

(b) For vessels using the Spanish longline system, each longline shall be at least 16 000 m in length;

(c) For vessels using the Spanish longline system, with longlines less than 16 000 m in length, each longline shall be of the maximum length to be used by the vessel in the Convention Area;

(d) For vessels using a longline system other than an autoline or Spanish longline system, each longline shall be of the maximum length to be used by the vessel in the Convention Area.

(ii) Randomise bottle test placement on the longline, noting that all tests should be applied midway between weights;

(iii) Calculate an individual sink rate for each bottle test at the time of the test, where:

(a) The sink rate shall be measured as the time taken for the longline to sink from the surface (0 m) to 10 m;

(b) This sink rate shall be at a minimum rate of 0.3 m/s;

(iv) If the minimum sink rate is not achieved at all eight sample points (four tests on two longlines), continue the testing until such time as a total of eight tests with a minimum sink rate of 0.3 m/s are recorded;

(v) All equipment and fishing gear used in the tests is to be to the same specifications as that to be used in the Convention Area.

B2. During fishing, for a vessel to be allowed to maintain the exemption to night-time setting requirements (paragraph 4 of Conservation Measure 25–02), regular longline sink rate monitoring shall be undertaken by the CCAMLR scientific observer. The vessel shall cooperate with the CCAMLR observer who shall:

(i) Attempt to conduct a bottle test on one longline set every twenty-four hour period;

(ii) Every seven days conduct at least four bottle tests on a single longline to determine any sink rate variation along the longline;

(iii) Randomise bottle test placement on the longline, noting that all tests should be applied halfway between weights;

(iv) Calculate an individual longline sink rate for each bottle test at the time of the test;

(v) Measure the longline sink rate as the time taken for the longline to sink from the surface (0 m) to 10 m.

B3. The vessel shall:

(i) Ensure that all longlines are weighted to achieve a minimum longline sink rate of 0.3 m/s at all times whilst operating under this exemption;

(ii) Report daily to its national agency on the achievement of this target whilst operating under this exemption;

(iii) Ensure that data collected from longline sink rate tests prior to entering the Convention Area and longline sink rate monitoring during fishing are recorded in the CCAMLR-approved format [1] and submitted to the relevant national agency and CCAMLR Data Manager within two months of the vessel departing a fishery to which this measure applies.

B4. A bottle test is to be conducted as described below.

Bottle Set Up

B5. 10 m of 2 mm multifilament nylon snood twine, or equivalent, is securely attached to the neck of a 500–1 000 ml plastic bottle [2] with a longline clip attached to the other end. The length measurement is taken from the attachment point (terminal end of the clip) to the neck of the bottle, and should be checked by the observer every few days.

B6. Reflective tape should be wrapped around the bottle to allow it to be observed in low light conditions and at night.

Test

B7. The bottle is emptied of water, the stopper is left open and the twine is wrapped around the body of the bottle for setting. The bottle with the encircled twine is attached to the longline [3], midway between weights (the attachment point).

B8. The observer records the time at which the attachment point enters the water as t1 in seconds. The time at which the bottle is observed to be pulled completely under is recorded as t_2 in seconds [4]. The result of the test is calculated as follows: Longline sink rate = $10/(t_2–t_1)$.

B9. The result should be equal to or greater than 0.3 m/s. These data are to be recorded in the space provided in the electronic observer logbook. Protocol C (for vessels monitoring longline sink rate with either (TDR) or bottle tests, and using internally weighted longlines with integrated weight of at least 50 g/m and designed to sink instantly with a linear profile at greater than 0.2 m/s with no external weights attached):

C1. Prior to entry into force of the licence for this fishery and once per fishing season prior to entering the Convention Area, the vessel shall, under observation by a scientific observer:

(i) Set a minimum of two longlines with either a minimum of four TDRs, or a minimum of four bottle tests (see paragraphs B5 to B9) on the middle one-third of each longline, where:

(a) For vessels using the auto longline system, each longline shall be at least 6 000 m in length;

(b) For vessels using the Spanish longline system, each longline shall be at least 16 000 m in length;

(c) For vessels using the Spanish longline system, with longlines less than 16 000 m in length, each longline shall be of the maximum length to be used by the vessel in the Convention Area;

(d) For vessels using a longline system other than an autoline or Spanish longline system, each longline shall be of the maximum length to be used by the vessel in the Convention Area.

(ii) Randomise TDR or bottle test placement on the longline;

(iii) Calculate an individual sink rate for each TDR when returned to the vessel, or for each bottle test at the time of the test, where:

(a) The sink rate shall be measured as an average of the time taken for the longline to sink from the surface (0 m) to 15 m for TDRs and the time taken for the longline to sink from the surface (0 m) to 10 m for bottle tests;

(b) This sink rate shall be at a minimum rate of 0.2 m/s;

(iv) If the minimum sink rate is not achieved at all eight sample points (four tests on two longlines), continue the testing until such time as a total of eight tests with a minimum sink rate of 0.2 m/s are recorded;

(v) All equipment and fishing gear used in the tests is to be to the same specifications as that to be used in the Convention Area.

C2. During fishing, for a vessel to be allowed to maintain the exemption to night-time setting requirements (paragraph 4 of Conservation Measure 25–02), regular longline sink rate monitoring shall be undertaken by the CCAMLR scientific observer. The vessel shall cooperate with the CCAMLR observer who shall:

(i) Attempt to conduct a TDR or bottle test on one longline set every twenty-four hour period;

(ii) Every seven days conduct at least four TDR or bottle tests on a single longline to determine any sink rate variation along the longline;

(iii) Randomise TDR or bottle test placement on the longline;

(iv) Calculate an individual longline sink rate for each TDR when returned to the vessel or each bottle test at the time of the test;

(v) Measure the longline sink rate for bottle tests as the time taken for the longline to sink from the surface (0 m) to 10 m, or for TDRs the average of the time taken for the longline to sink from the surface (0 m) to 15 m.

C3. The vessel shall:

(i) Ensure that all longlines are set so as to achieve a minimum longline sink

rate of 0.2 m/s at all times whilst operating under this exemption;

(ii) Report daily to its national agency on the achievement of this target whilst operating under this exemption;

(iii) Ensure that data collected from longline sink rate tests prior to entering the Convention Area and longline sink rate monitoring during fishing are recorded in the CCAMLR-approved format[1] and submitted to the relevant national agency and CCAMLR Data Manager within two months of the vessel departing a fishery to which this measure applies.

[1] Included in the scientific observer electronic logbook.

[2] A plastic water bottle that has a 'stopper' is needed. The stopper of the bottle is left open so that the bottle will fill with water after being pulled under water. This allows the plastic bottle to be re-used rather than being crushed by water pressure.

[3] On autolines attach to the backbone; on the Spanish longline system attach to the hookline.

[4] Binoculars will make this process easier to view, especially in foul weather.

Conservation Measure 25–02 (2005)[1 2]

Minimisation of the Incidental Mortality of Seabirds in the Course of Longline Fishing or Longline Fishing Research in the Convention Area

Species seabirds
Area all
Season all
Gear longline

The Commission,

Noting the need to reduce the incidental mortality of seabirds during longline fishing by minimising their attraction to fishing vessels and by preventing them from attempting to seize baited hooks, particularly during the period when the lines are set,

Recognising that in certain subareas and divisions of the Convention Area there is also a high risk that seabirds will be caught during line hauling,

Adopts the following measures to reduce the possibility of incidental mortality of seabirds during longline fishing.

1. Fishing operations shall be conducted in such a way that hooklines[3] sink beyond the reach of seabirds as soon as possible after they are put in the water.

2. Vessels using autoline systems should add weights to the hookline or use integrated weight hooklines while deploying longlines. Integrated weight (IW) longlines of a minimum of 50 g/m or attachment to non-IW longlines of 5 kg weights at 50 to 60 m intervals are recommended.

3. Vessels using the Spanish method of longline fishing should release weights before line tension occurs; weights of at least 8.5 kg mass shall be used, spaced at intervals of no more than 40 m, or weights of at least 6 kg mass shall be used, spaced at intervals of no more than 20 m.

4. Longlines shall be set at night only (i.e. during the hours of darkness between the times of nautical twilight).[4] thnsp;[5] During longline fishing at night, only the minimum ship's lights necessary for safety shall be used.

5. The dumping of offal is prohibited while longlines are being set. The dumping of offal during the haul shall be avoided. Any such discharge shall take place only on the opposite side of the vessel to that where longlines are hauled. For vessels or fisheries where there is not a requirement to retain offal on board the vessel, a system shall be implemented to remove fish hooks from offal and fish heads prior to discharge.

6. Vessels which are so configured that they lack on-board processing facilities or adequate capacity to retain offal on board, or the ability to discharge offal on the opposite side of the vessel to that where longlines are hauled, shall not be authorised to fish in the Convention Area.

7. A streamer line shall be deployed during longline setting to deter birds from approaching the hookline. Specifications of the streamer line and its method of deployment are given in the appendix to this measure.

8. A device designed to discourage birds from accessing baits during the haul of longlines shall be employed in those areas defined by CCAMLR as average-to-high or high (Level of Risk 4 or 5) in terms of risk of seabird by-catch. These areas are currently Statistical Subareas 48.3, 58.6 and 58.7 and Statistical Divisions 58.5.1 and 58.5.2.

9. Every effort should be made to ensure that birds captured alive during longlining are released alive and that wherever possible hooks are removed without jeopardising the life of the bird concerned.

10. Other variations in the design of mitigation measures may be tested on vessels carrying two observers, at least one appointed in accordance with the CCAMLR Scheme of International Scientific Observation, providing that all other elements of this conservation measure are complied with[6]. Full proposals for any such testing must be notified to the Working Group on Fish Stock Assessment (WG–FSA) in advance of the fishing season in which the trials are proposed to be conducted.

[1] Except for waters adjacent to the Kerguelen and Crozet Islands

[2] Except for waters adjacent to the Prince Edward Islands

[3] Hookline is defined as the groundline or mainline to which the baited hooks are attached by snoods.

[4] The exact times of nautical twilight are set forth in the Nautical Almanac tables for the relevant latitude, local time and date. A copy of the algorithm for calculating these times is available from the CCAMLR Secretariat. All times, whether for ship operations or observer reporting, shall be referenced to GMT.

[5] Wherever possible, setting of lines should be completed at least three hours before sunrise (to reduce loss of bait to/catches of white-chinned petrels).

[6] The mitigation measures under test should be constructed and operated taking full account of the principles set out in WG–FSA–03/22 (the published version of which is available from the ccamlr Secretariat and website); testing should be carried out independently of actual commercial fishing and in a manner consistent with the spirit of Conservation Measure 21–02.

Appendix to Conservation Measure 25–02

1. The aerial extent of the streamer line, which is the part of the line supporting the streamers, is the effective seabird deterrent component of a streamer line. Vessels are encouraged to optimise the aerial extent and ensure that it protects the hookline as far astern of the vessel as possible, even in crosswinds.

2. The streamer line shall be attached to the vessel such that it is suspended from a point a minimum of 7 m above the water at the stern on the windward side of the point where the hookline enters the water.

3. The streamer line shall be a minimum of 150 m in length and include an object towed at the seaward end to create tension to maximise aerial coverage. The object towed should be maintained directly behind the attachment point to the vessel such that in crosswinds the aerial extent of the streamer line is over the hookline.

4. Branched streamers, each comprising two strands of a minimum of 3 mm diameter brightly coloured plastic tubing[7] or cord, shall be attached no more than 5 m apart commencing 5 m from the point of attachment of the streamer line to the vessel and thereafter along the aerial extent of the line. Streamer length shall range between minimums of 6.5 m from the stern to 1 m for the seaward end. When a streamer line is fully deployed, the branched streamers should reach the sea surface in the absence of wind and swell. Swivels or a similar device should be placed in the streamer line in such a way as to prevent streamers being twisted around the streamer line. Each branched streamer may also have a swivel or other device at its

attachment point to the streamer line to prevent fouling of individual streamers.

5. Vessels are encouraged to deploy a second streamer line such that streamer lines are towed from the point of attachment each side of the hookline. The leeward streamer line should be of similar specifications (in order to avoid entanglement the leeward streamer line may need to be shorter) and deployed from the leeward side of the hookline.

[7] Plastic tubing should be of a type that is manufactured to be protected from ultraviolet radiation.

Streamer Line

Aerial extent
Towing point
Streamers
Hookline
Towed object creating tension 5 m
5 m
5 m
7 m

Conservation Measure 32–09 (2005)

Prohibition of Directed Fishing for Dissostichus spp. Except in Accordance With Specific Conservation Measures in the 2005/06 Season

Species toothfish
Area 48.5
Season 2005/06
Gear all

The Commission hereby adopts the following conservation measure in accordance with Article IX of the Convention:

Directed fishing for *Dissostichus* spp. in Statistical Subarea 48.5 is prohibited from 1 December 2005 to 30 November 2006.

Conservation Measure 33–02 (2005)

Limitation of By-Catch in Statistical Division 58.5.2 in the 2005/06 Season

Species by-catch
Area 58.5.2
Season 2005/06
Gear all

1. There shall be no directed fishing for any species other than *Dissostichus* eleginoides and Champsocephalus gunnari in Statistical Division 58.5.2 in the 2005/06 fishing season.

2. In directed fisheries in Statistical Division 58.5.2 in the 2005/06 season, the by-catch of Channichthys rhinoceratus shall not exceed 150 tonnes, the by-catch of Lepidonotothen squamifrons shall not exceed 80 tonnes, the by-catch of Macrourus spp. shall not exceed 360 tonnes and the by-catch of skates and rays shall not exceed 120 tonnes. For the purposes of this measure, 'Macrourus spp.' and 'skates and rays' should each be counted as a single species.

3. The by-catch of any fish species not mentioned in paragraph 2, and for which there is no other catch limit in force, shall not exceed 50 tonnes in Statistical Division 58.5.2.

4. If, in the course of a directed fishery, the by-catch in any one haul of Channichthys rhinoceratus, Lepidonotothen squamifrons, Macrourus spp., Somniosus spp. or skates and rays is equal to, or greater than 2 tonnes, then the fishing vessel shall not fish using that method of fishing at any point within 5 n miles [1] of the location where the by-catch exceeded 2 tonnes for a period of at least five days [2]. The location where the by-catch exceeded 2 tonnes is defined as the path [3] followed by the fishing vessel.

5. If, in the course of a directed fishery, the by-catch in any one haul of any other by-catch species for which by-catch limitations apply under this conservation measure is equalto, or greater than 1 tonne, then the fishing vessel shall not fish using that method of fishing at any point within 5 n miles [1] of the location where the by-catch exceeded 1 tonne for a period of at least five days [2]. The location where the by-catch exceeded 1 tonne is defined as the path [3] followed by the fishing vessel.

[1] This provision concerning the minimum distance separating fishing locations is adopted pending the adoption of a more appropriate definition of a fishing location by the Commission.

[2] The specified period is adopted in accordance with the reporting period specified in Conservation Measure 23–01, pending the adoption of a more appropriate period by the Commission.

[3] For a trawl the path is defined from the point at which the fishing gear was first deployed from the fishing vessel to the point at which the fishing gear was retrieved by the fishing vessel. For a longline or a pot, the path is defined from the point at which the first anchor of a set was deployed to the point at which the last anchor of that set was deployed.

Conservation Measure 33–03 (2005) [1] [2]

Limitation of By-Catch in New and Exploratory Fisheries in the 2005/06 Season

Species by-catch
Area various
Season 2005/06
Gear all

1. This conservation measure applies to new and exploratory fisheries in all areas containing small-scale research units (SSRUs) in the 2005/06 season except where specific by-catch conservation measures apply.

2. The catch limits for all by-catch species are set out in Annex 33–03/A. Within these catch limits, the total catch of by-catch species in any SSRU or combination of SSRUs as defined in relevant conservation measures shall not exceed the following limits:

- Skates and rays 5% of the catch limit of *Dissostichus* spp. or 50 tonnes whichever is greater;
- Macrourus spp. 16% of the catch limit for *Dissostichus* spp. or 20 tonnes, whichever is greater;
- All other species combined 20 tonnes.

3. For the purposes of this measure 'Macrourus spp.' and 'skates and rays' should each be counted as a single species.

4. If the by-catch of any one species is equal to or greater than 1 tonne in any one haul or set, then the fishing vessel shall move to another location at least 5 n miles [3] distant. The fishing vessel shall not return to any point within 5 n miles of the location where the by-catch exceeded 1 tonne for a period of at least five days [4]. The location where the by-catch exceeded 1 tonne is defined as the path [5] followed by the fishing vessel.

5. If the catch of Macrourus spp. taken by a single vessel in any two 10-day periods [6] in a single SSRU exceeds 16% of the catch of *Dissostichus* spp. by that vessel in that SSRU in those periods, the vessel shall cease fishing in that SSRU for the remainder of the season.

[1] Except for waters adjacent to the Kerguelen and Crozet Islands.

[2] Except for waters adjacent to the Prince Edward Islands.

[3] This provision concerning the minimum distance separating fishing locations is adopted pending the adoption of a more appropriate definition of a fishing location by the Commission.

[4] The specified period is adopted in accordance with the reporting period specified in Conservation Measure 23–01, pending the adoption of a more appropriate period by the Commission.

[5] For a trawl the path is defined from the point at which the fishing gear was first deployed from the fishing vessel to the point at which the fishing gear was retrieved by the fishing vessel. For a longline the path is defined from the point at which the first anchor of a set was deployed to the point at which the last anchor of that set was deployed.

[6] A 10-day period is defined as day 1 to day 10, day 11 to day 20, or day 21 to the last day of the month.

Annex 33–03/A

Table 1: By-catch catch limits for new and exploratory fisheries in 2005/06.

Subarea/Division
Region *Dissostichus* spp. catch limit
(tonnes per region)
Skates and rays
(tonnes per region)
By-catch catch limit Macrourus spp.
(tonnes per region)
Other species
(tonnes per SSRU)

48.6 north of 60°S 455 50 73 20 south of 60°S 455 50 73 20
58.4.1 whole division 600 50 96 20,
58.4.2 whole division 780 50 124 20,
58.4.3a whole division 250 50 26 20,
58.4.3b whole division 300 50 159 20,
88.1 whole subarea 2964 148 474 20,
88.2 south of 65°S 487 50 78 20.

Region: As defined in column 2 of this table.

Rules for catch limits for by-catch species:

Skates and rays: 5% of the catch limit for *Dissostichus* spp. or 50 tonnes, which ever is greatest (SC–CAMLR–XXI, paragraph 5.76).

Macrourus spp.: 16% of the catch limit for *Dissostichus* spp., except in Divisions 58.4.3a and 58.4.3b (SC–CAMLR–XXII, paragraph 4.207).

Other species: 20 tonnes per SSRU.

Conservation Measure 41–01 (2005)[1] [2]

General Measures for Exploratory Fisheries for *Dissostichus* spp. in the Convention Area in the 2005/06 Season

Species toothfish
Area various
Season 2005/06
Gear longline, trawl

The Commission hereby adopts the following conservation measure:

1. This conservation measure applies to exploratory fisheries using the trawl or longline methods except for such fisheries where the Commission has given specific exemptions to the extent of those exemptions. In trawl fisheries, a haul comprises a single deployment of the trawl net. In longline fisheries, a haul comprises the setting of one or more lines in a single location.

2. Fishing should take place over as large a geographical and bathymetric range as possible to obtain the information necessary to determine fishery potential and to avoid over-concentration of catch and effort. To this end, fishing in any small-scale research unit (SSRU) shall cease when the reported catch reaches the specified catch limit[3] and that SSRU shall be closed to fishing for the remainder of the season.

3. In order to give effect to paragraph 2 above:

(i) The precise geographic position of a haul in trawl fisheries will be determined by the mid-point of the path between the start-point and end-point of the haul for the purposes of catch and effort reporting;

(ii) The precise geographic position of a haul/set in longline fisheries will be determined by the centre-point of the line or lines deployed for the purposes of catch and effort reporting;

(iii) The vessel will be deemed to be fishing in any SSRU from the beginning of the setting process until the completion of the hauling of all lines;

(iv) Catch and effort information for each species by SSRU shall be reported to the Executive Secretary every five days using the Five-Day Catch and Effort Reporting System set out in Conservation Measure 23–01;

(v) The Secretariat shall notify Contracting Parties participating in these fisheries when the total catch for *Dissostichus* eleginoides and *Dissostichus* mawsoni combined in any SSRU is likely to reach the specified catch limit, and of the closure of that SSRU when that limit is reached. Upon such notification from the Secretariat, all fishing gear shall be hauled immediately. No part of a trawl path may lie within a closed SSRU and no part of a longline may be set within a closed SSRU.

4. The by-catch in each exploratory fishery shall be regulated as in Conservation Measure 33–03.

5. The total number and weight of *Dissostichus* eleginoides and *Dissostichus* mawsoni discarded, including those with the 'jellymeat' condition, shall be reported.

6. Each vessel participating in the exploratory fisheries for *Dissostichus* spp. during the 2005/06 season shall have one scientific observer appointed in accordance with the CCAMLR Scheme of International Scientific Observation, and where possible one additional scientific observer, on board throughout all fishing activities within the fishing season.

7. The Data Collection Plan (Annex 41–01/A), Research Plan (Annex 41–01/B) and Tagging Program (Annex 41–01/C) shall be implemented. Data collected pursuant to the Data Collection and Research Plans for the period up to 31 August 2006 shall be reported to CCAMLR by 30 September 2006 so that the data will be available to the meeting of the Working Group on Fish Stock Assessment (WG–FSA) in 2006. Such data taken after 31 August 2006 shall be reported to CCAMLR not later than three months after the closure of the fishery, but, where possible, submitted in time for the consideration of WG–FSA.

8. Members who choose not to participate in the fishery prior to the commencement of the fishery shall inform the Secretariat of changes in their plans no later than one month before the start of the fishery. If, for whatever reason, Members are unable to participate in the fishery, they shall inform the Secretariat no later than one week after finding that they cannot participate. The Secretariat will inform all Contracting Parties immediately after such notification is received.

[1] Except for waters adjacent to the Kerguelen and Crozet Islands.

[2] Except for waters adjacent to the Prince Edward Islands.

[3] Unless otherwise specified, the catch limit for *Dissostichus* spp. shall be 100 tonnes in any SSRU except in respect of Subarea 88.2.

Annex 41–01/A

Data Collection Plan for Exploratory Fisheries

1. All vessels will comply with the Five-day Catch and Effort Reporting System (Conservation Measure 23–01) and Monthly Fine-scale Catch, Effort and Biological Data Reporting Systems (Conservation Measures 23–04 and 23–05).

2. All data required by the CCAMLR Scientific Observers Manual for finfish fisheries will be collected. These include:

(i) Position, date and depth at the start and end of every haul;

(ii) Haul-by-haul catch and catch per effort by species;

(iii) Haul-by-haul length frequency of common species;

(iv) Sex and gonad state of common species;

(v) Diet and stomach fullness;

(vi) Scales and/or otoliths for age determination;

(vii) Number and mass by species of by-catch of fish and other organisms;

(viii) Observation on occurrence and incidental mortality of seabirds and mammals in relation to fishing operations.

3. Data specific to longline fisheries will be collected. These include:

(i) Position and sea depth at each end of every line in a haul;

(ii) Setting, soak, and hauling times;

(iii) Number and species of fish lost at surface;

(iv) Number of hooks set;

(v) Bait type;

(vi) Baiting success (%);

(vii) Hook type;

(viii) Sea and cloud conditions and phase of the moon at the time of setting the lines.

Annex 41–01/B

Research Plan for Exploratory Fisheries

1. Activities under this research plan shall not be exempted from any conservation measure in force.

2. This plan applies to all small-scale research units (SSRUs) as defined in Table 1 and Figure 1.

3. Except when fishing in Statistical Subareas 88.1 and 88.2 (see paragraph 5), any vessel undertaking prospecting or commercial fishing in any SSRU must undertake the following research activities:

(i) On first entry into an SSRU, the first 10 hauls, designated 'first series,' whether by trawl or longline, shall be designated 'research hauls' and must satisfy the criteria set out in paragraph 4.

(ii) The next 10 hauls, or 10 tonnes of catch for longlining, whichever trigger level is achieved first, or 10 tonnes of catch for trawling, are designated the 'second series'. Hauls in the second series can, at the discretion of the master, be fished as part of normal exploratory fishing. However, provided they satisfy the requirements of paragraph 4, these hauls can also be designated as research hauls.

(iii) On completion of the first and second series of hauls, if the master wishes to continue to fish within the SSRU, the vessel must undertake a 'third series' which will result in a total of 20 research hauls being made in all three series. The third series of hauls shall be completed during the same visit as the first and second series in an SSRU.

(iv) On completion of 20 research hauls the vessel may continue to fish within the SSRU.

4. To be designated as a research haul:

(i) Each research haul must be separated by not less than 5 n miles from any other research haul, distance to be measured from the geographical mid-point of each research haul;

(ii) Each haul shall comprise: for longlines, at least 3 500 hooks and no more than 10 000 hooks; this may comprise a number of separate lines set in the same location; for trawls, at least 30 minutes effective fishing time as defined in the Draft Manual for Bottom Trawl Surveys in the Convention Area (SC–CAMLR–XI, Annex 5, Appendix H, Attachment E, paragraph 4);

(iii) Each haul of a longline shall have a soak time of not less than six hours, measured from the time of completion of the setting process to the beginning of the hauling process.

5. In the exploratory fisheries in Subareas 88.1 and 88.2, all data specified in the Data Collection Plan (Annex 41–01/A) of this conservation measure shall be collected for every haul; all fish of each *Dissostichus* species in a haul (up to a maximum of 35 fish) are to be measured and randomly sampled for biological studies (paragraphs 2(iv) to (vi) of Annex 41–01/A).

6. In all other exploratory fisheries, all data specified in the Data Collection Plan (Annex 41–01/A) of this conservation measure shall be collected for every research haul; inparticular, all fish in a research haul up to 100 fish are to be measured and at least 30 fish sampled for biological studies (paragraphs 2(iv) to (vi) of Annex 41–01/A). Where more than 100 fish are caught, a method for randomly subsampling the fish should be applied.

Figure 1: Small-scale research units for new and exploratory fisheries. The boundaries of these units are listed in Table 1. EEZ boundaries for Australia, France and South Africa are marked in order to address notifications for new and exploratory fisheries in waters adjacent to these zones. Dashed line—delineation between *Dissostichus* eleginoides and *Dissostichus* mawsoni.

Table 1: Description of small-scale research units (SSRUs) (see also Figure 1).

Region SSRU Boundary Line

48.6 A From 50°S 20°W, due east to 30°E, due south to 60°S, due west to 20°W, due north to 50°S.
B From 60°S 20°W, due east to 10°W, due south to coast, westward along coast to 20°W, due north to 60°S.
C From 60°S 10°W, due east to 0° longitude, due south to coast, westward along coast to 10°W, due north to 60°S.
D From 60°S 0° longitude, due east to 10°E, due south to coast, westward along coast to 0° longitude, due north to 60°S.
E From 60°S 10°E, due east to 20°E, due south to coast, westward along coast to 10°E, due north to 60°S.
F From 60°S 20°E, due east to 30°E, due south to coast, westward along coast to 20°E, due north to 60°S.
58.4.1 A From 55°S 86°E, due east to 150°E, due south to 60°S, due west to 86°E, due north to 55°S.
B From 60°S 86°E, due east to 90°E, due south to coast, westward along coast to 80°E, due north to 64°S, due east to 86°E, due north to 60°S.
C From 60°S 90°E, due east to 100°E, due south to coast, westward along coast to 90°E, due north to 60°S.
D From 60°S 100°E, due east to 110°E, due south to coast, westward along coast to 100°E, due north to 60°S.
E From 60°S 110°E, due east to 120°E, due south to coast, westward along coast to 110°E, due north to 60°S.
F From 60°S 120°E, due east to 130°E, due south to coast, westward along coast to 120°E, due north to 60°S.
G From 60°S 130°E, due east to 140°E, due south to coast, westward along coast to 130°E, due north to 60°S.
H From 60°S 140°E, due east to 150°E, due south to coast, westward along coast to 140°E, due north to 60°S.
58.4.2 A From 62°S 30°E, due east to 40°E, due south to coast, westward along coast to 30°E, due north to 62°S.
B From 62°S 40°E, due east to 50°E, due south to coast, westward along coast to 40°E, due north to 62°S.
C From 62°S 50°E, due east to 60°E, due south to coast, westward along coast to 50°E, due north to 62°S.
D From 62°S 60°E, due east to 70°E, due south to coast, westward along coast to 60°E, due north to 62°S.
E From 62°S 70°E, due east to 73°10'E, due south to 64°S, due east to 80°E, due south to coast, westward Lonag coast to 70°E, due north to 62°S.
58.4.3a A Whole division, from 56°S 60°E, due east to 73°10′E, due south to 62°S, due west to 60°E, due north to 56°S.
58.4.3b A Whole division, from 56°S 73°10′E, due east to 80°E, due north to 55°S, due east to 86°E, south to 64°S, due west to 73°10′E, due north to 56°S.
58.4.4 A From 51°S 40°E, due east to 42°E, due south to 54°S, due west to 40°E, due north to 51°S.
B From 51°S 42°E, due east to 46°E, due south to 54°S, due west to 42°E, due north to 51°S.
C From 51°S 46°E, due east to 50°E, due south to 54°S, due west to 46°E, due north to 51°S.
D Whole division excluding SSRUs A, B, C, and with outer boundary from 50°S 30°E, due east to 60°E, due south to 62°S, due west to 30°E, due north to 50°S.

continued Table 1 (continued) Region SSRU Boundary Line

58.6 A From 45°S 40°E, due east to 44°E, due south to 48°S, due west to 40°E, due north to 45°S.
B From 45°S 44°E, due east to 48°E, due south to 48°S, due west to 44°E, due north to 45°S.
C From 45°S 48°E, due east to 51°E, due south to 48°S, due west to 48°E, due north to 45°S.
D From 45°S 51°E, due east to 54°E, due south to 48°S, due west to 51°E, due north to 45°S.
58.7 A From 45°S 37°E, due east to 40°E, due south to 48°S, due west to 37°E, due north to 45°S.
88.1 A From 60°S 150°E, due east to 170°E, due south to 65°S, due west to 150°E, due north to 60°S.
B From 60°S 170°E, due east to 179°E, due south to 66°40′S, due west to 170°E, due north to 60°S.
C From 60°S 179°E, due east to 170°W, due south to 70°S, due west to 178°W, due north to 66°40′S, due west to 179°E, due north to 60°S.
D From 65°S 150°E, due east to 160°E, due south to coast, westward along coast to 150°E, due north to 65°S.
E From 65°S 160°E, due east to 170°E, due south to 68°30′S, due west to 160°E, due north to 65°S.
F From 68°30′S 160°E, due east to 170°E, due south to coast, westward along coast to 160°E, due north to 68°30′S.
G From 66°40′S 170°E, due east to 178°W, due south to 70°S, due west to 178°50′E, due south to 70°50′S, due west to 170°E, due north to 66°40′S.
H From 70°50′S 170°E, due east to 178°50′E, due south to 73°S, due west to coast, northward along coast to 170°E, due north to 70°50′S.
I From 70°S 178°50′E, due east to 170°W, due south to 73°S, due west to 178°50′E, due north to 70°S.
J From 73°S at coast near 169°30′E, due east to 178°50′E, due south to 80°S, due west to coast, northward along coast to 73°S.
K From 73°S 178°50′E, due east to 170°W, due south to 76°S, due west to 178°50′E, due north to 73°S.
L From 76°S 178°50′E, due east to 170°W,

due south to 80°S, due west to 178°50′E, due north to 76°S.

88.2 A From 60°S 170°W, due east to 160°W, due south to coast, westward along coast to 170°W, due north to 60°S.

B From 60°S 160°W, due east to 150°W, due south to coast, westward along coast to 160°W, due north t 60°S.

C From 60°S 150°W, due east to 140°W, due south to coast, westward along coast to 150°W, due north to 60°S.

D From 0°S 140°W, due east to 130°W, due south to coast, westward along coast to 140°W, due north to

E From 60°S 130°W, due east to 120°W, due south to coast, westward along coast to 130°W, due north to 60°S.

F From 60°S 120°W, due east to 110°W, due south to coast, westward along coast to 120°W, due north to 60°S.

G From 60°S 110°W, due east to 105°W, due south to coast, westward along coast to 110°W, due north to 60°S.

88.3 A From 60°S 105°W, due east to 95°W, due south to coast, westward along coast to 105°W, due north to 60°S.

B From 60°S 95°W, due east to 85°W, due south to coast, westward along coast to 95°W, due north to 60°S.

C From 60°S 85°W, due east to 75°W, due south to coast, westward along coast to 85°W, due north to 60°S.

D 60 From 60°S 75°W, due east to 70°W, due south to coast, westward along coast to 75°W, due north to 60°S.

Annex 41–01/C

Tagging Program for Dissostichus spp. in Exploratory Fisheries

1. The CCAMLR scientific observer, in cooperation with the fishing vessel, shall be required to undertake the tagging program.

2. This program shall apply in each exploratory longline fishery, and any vessel that participates in more then one exploratory fishery shall apply the following in each exploratory fishery in which that vessels fishes:

(i) Each longline vessel shall tag and release *Dissostichus* spp. at a rate of one toothfish per tonne of green weight catch throughout the season according to the CCAMLR Tagging Protocol.[1] Vessels shall only discontinue tagging after they have tagged 500 toothfish, or leave the fishery having tagged one toothfish per tonne of green weight caught.

(ii) The program shall target toothfish of all sizes in order to meet the tagging requirement of one toothfish per tonne of green weight catch.[2] All released toothfish must be double-tagged and releases should cover as broad a geographical area as possible.

(iii) All tags shall be clearly imprinted with a unique serial number and a return address so that the origin of tags can be traced in the case of recapture of the tagged toothfish. [1]

Recaptured tagged fish (*i.e.* fish caught that have a previously inserted tag) shall not be re-released, even if at liberty for only a short period.

(v) All recaptured tagged fish should be biologically sampled (length, weight, sex, gonad stage), an electronic photograph taken if possible, the otoliths recovered and the tag removed.

3. All relevant tag data and any data recording tag recaptures shall be reported electronically in the CCAMLR format [1] to the CCAMLR Data Manager within three months of the vessel departing the exploratory fisheries.

4. All relevant tag data, any data recording tag recaptures, and specimens (tags and otoliths) from recaptures shall also be reported electronically in the CCAMLR format [1] to the relevant regional tag data repository as detailed in the CCAMLR Tagging Protocol (available at *www.ccamlr.org).*

[1] In accordance with the CCAMLR Tagging Protocol for exploratory fisheries which is available from the Secretariat and at *www.ccamlr.org.*

[2] In meeting this requirement, fish to be tagged should be in good condition.

Conservation Measure 41–02 (2005)

Limits on the Fishery for *Dissostichus* Eleginoides in Statistical Subarea 48.3 in the 2005/06 Season

Species toothfish
Area 48.3
Season 2005/06
Gear longline, pot

The Commission hereby adopts the following conservation measure in accordance with Conservation Measure 31–01:

1. The fishery for *Dissostichus* eleginoides in Statistical Subarea 48.3 shall be conducted by vessels using longlines and pots only.

2. For the purpose of this fishery, the area open to the fishery is defined as that portion of Statistical Subarea 48.3 that lies within the area bounded by latitudes 52°30′S and 56°0′S and by longitudes 33°30′W and 48°0′W.

Access

3. A map illustrating the area defined by paragraph 2 is appended to this conservation measure (Annex 41–02/A). The portion of Subarea 48.3 outside that defined above shall be closed to directed fishing for *Dissostichus* eleginoides in the 2005/06 season.

Catch Limit

4. The total catch of *Dissostichus* eleginoides in Statistical Subarea 48.3 in the 2005/06 season shall be limited to 3 556 tonnes. The catch limit shall be further subdivided between the Management Areas shown in Annex 41–02/A as follows:

Management Area A: 0 tonnes
Management Area B: 1 067 tonnes
Management Area C: 2 489 tonnes

Season

5. For the purpose of the longline fishery for *Dissostichus* eleginoides in Statistical Subarea 48.3, the 2005/06 season is defined as the period from 1 May to 31 August 2006, or until the catch limit is reached, whichever is sooner. For the purpose of the pot fishery for *Dissostichus* eleginoides in Statistical Subarea 48.3, the 2005/06 season is defined as the period from 1 December 2005 to 30 November 2006, or until the catch limit is reached, whichever is sooner. The season for longline fishing operations may be extended to 14 September 2006 for any vessel which has demonstrated full compliance with Conservation Measure 25–02 in the 2004/05 season. This extension to the season shall also be subject to a catch limit of three (3) seabirds per vessel. If three seabirds are caught during the season extension, fishing shall cease immediately for that vessel.

By-Catch

6. The by-catch of crab in any pot fishery undertaken shall be counted against the catch limit in the crab fishery in Statistical Subarea 48.3.

7. The by-catch of finfish in the fishery for *Dissostichus* eleginoides in Statistical Subarea 48.3 in the 2005/06 season shall not exceed 177 tonnes for skates and rays and 177 tonnes for Macrourus spp. For the purpose of these by-catch limits, 'Macrourus spp.' and 'skates and rays' shall each be counted as a single species.

8. If the by-catch of any one species is equal to or greater than 1 tonne in any one haul or set, then the fishing vessel shall move to another location at least 5 n miles [1] distant. The fishing vessel shall not return to any point within 5 n miles of the location where the by-catch exceeded 1 tonne for a period of at least five days [2]. The location where the by-catch exceeded 1 tonne is defined as the path [3] followed by the fishing vessel.

Mitigation

9. The operation of this fishery shall be carried out in accordance with Conservation Measure 25–02 so as to minimise the incidental mortality of seabirds in the course of fishing.

Observers

10. Each vessel participating in this fishery shall have at least one scientific observer appointed in accordance with

the CCAMLR Scheme of International Scientific Observation, and where possible one additional scientific observer, on board throughout all fishing activities within the fishing period.

Data: Catch/Effort

11. For the purpose of implementing this conservation measure in the 2005/06 season, the following shall apply:

(i) The Five-day Catch and Effort Reporting System set out in Conservation Measure 23–01;

(ii) The Monthly Fine-scale Catch and Effort Reporting System set out in Conservation Measure 23–04. Fine-scale data shall be submitted on a haul-by-haul basis.

12. For the purpose of Conservation Measures 23–01 and 23–04, the target species is *Dissostichus* eleginoides and by-catch species are defined as any species other than *Dissostichus* eleginoides.

13. The total number and weight of *Dissostichus* eleginoides discarded, including those with the 'jellymeat' condition, shall be reported. These fish will count towards the total allowable catch.

Data: Biological

14. Fine-scale biological data, as required under Conservation Measure 23–05, shall be collected and recorded. Such data shall be reported in accordance with the CCAMLR Scheme of International Scientific Observation.

Research Fishing

15. Research fishing under the provisions of Conservation Measure 24–01 shall be limited to 10 tonnes of catch and to one vessel in Management Area A shown in the map in Annex 41–02/A during the 2005/06 season. Catches of *Dissostichus* eleginoides taken under the provisions of Conservation Measure 24–01 in the area of the fishery defined in this conservation measure shall be considered as part of the catch limit.

[1] This provision concerning the minimum distance separating fishing locations is adopted pending the adoption of a more appropriate definition of a fishing location by the Commission.

[2] The specified period is adopted in accordance with the reporting period specified in Conservation Measure 23–01, pending the adoption of a more appropriate period by the Commission.

[3] For a longline or a pot, the path is defined from the point at which the first anchor of a set was deployed to the point at which the last anchor of that set was deployed.

Annex 41–02/A

Subarea 48.3—The area of the fishery and the three management areas for catch allocation in the 2005/06 season according to paragraph 4. Latitudes and longitudes are given in degrees and minutes. 1 000 and 2 000 m contours are shown.

40 W 43 30′ W
Subarea 48.3
52 30′ S
33 30′ W
56 S
Management
Area B
Management
Area A
Management
Area C
48 00′ W

Conservation Measure 41–03 (2005)

Limits on the Fishery for *Dissostichus* Eleginoides in Statistical Subarea 48.4 in the 2005/06, 2006/07 and 2007/08 Fishing Seasons

Species toothfish
Area 48.4
Season 2005/06–2007/08
Gear Longline

Access

1. Directed fishing shall be by longlines only. The use of all other methods of directed fishing for *Dissostichus* eleginoides in Statistical Subarea 48.4 shall be prohibited.

2. For the purpose of this fishery, the area open to fishing is defined as that portion of Statistical Subarea 48.4 that lies within the area bounded by latitudes 55°30′S and 57°20′S and by longitudes 25°30′W and 29°30′W.

3. A map illustrating the area defined by paragraph 2 is appended to this conservation measure (Annex 41–03/A). The portion of Statistical Subarea 48.4 outside that defined above shall be closed to directed fishing for *Dissostichus* eleginoides in the 2005/06, 2006/07 and 2007/08 seasons.

4. The total catch of *Dissostichus* eleginoides in Statistical Subarea 48.4 shall be limited to 100 tonnes per season.

Catch Limit

5. Taking of *Dissostichus* mawsoni, other than for scientific research purposes, is prohibited.

6. For the purposes of the fishery for *Dissostichus* eleginoides in Statistical Subarea 48.4, the fishing season shall be 1 April to 30 September, or until the catch limit for *Dissostichus* eleginoides in Statistical Subarea 48.4 is reached, whichever is sooner.

Season

Mitigation

7. The operation of this fishery shall be carried out in accordance with Conservation Measure 25–02 so as to minimise the incidental mortality of seabirds in the course of fishing.

Observers

8. Each vessel participating in the fishery for *Dissostichus* eleginoides in Statistical Subarea 48.4 shall have at least one scientific observer appointed in accordance with the CCAMLR Scheme of International Scientific Observation, on board throughout all fishing activities within the fishing period.

Data: Catch/Effort

9. For the purpose of implementing this conservation measure, the following shall apply:

(i) The Five-day Catch and Effort Reporting System set out in Conservation Measure 23–01;

(ii) The Monthly Fine-scale Catch and Effort Data Reporting System set out in Conservation Measure 23–04. Data shall be reported on a haul-by-haul basis. For the purposes of Conservation Measure 23–04, the target species is *Dissostichus* eleginoides, and by-catch species' are defined as any species other than *Dissostichus* eleginoides.

Data: Biological

10. Fine-scale biological data, as required under Conservation Measure 23–05 shall be collected and recorded. Such data shall be reported in accordance with the Scheme of International Scientific Observation.

Tagging Program

11. Each vessel taking part in the fishery for *Dissostichus* eleginoides in Statistical Subarea 48.4 shall undertake a tagging program in accordance with the CCAMLR Tagging Protocol. The following additional provisions shall apply:

(i) Fish should be tagged at an average rate of five fish per tonne of green weight catch throughout the season;

(ii) Fish should be tagged that have been caught across as broad a range of depths within the designated area as practicable;

(iii) Fish of a range of total lengths should be tagged, concentrating in particular on animals in the vulnerable size range (650–1 000 mm).

Annex 41–03/A

Subarea 48.4—the area of the fishery in the 2005/06, 2006/07 and 2007/08 seasons according to paragraph 2. Latitudes and longitudes are given in degrees. 1 000 and 2 000 m contours are shown.

59
56

55
S
57
58
30 29 28 27 W
Subarea 48.4
25 26

Conservation Measure 41–04 (2005)

Limits on the Exploratory Fishery for *Dissostichus* spp. in Statistical Subarea 48.6 in the 2005/06 Season

Species toothfish
Area 48.6
Season 2005/06
Gear longline

The Commission hereby adopts the following conservation measure in accordance with Conservation Measure 21–02:

Access

1. Fishing for *Dissostichus* spp. in Statistical Subarea 48.6 shall be limited to the exploratory longline fishery by Japan and New Zealand. The fishery shall be conducted by Japanese and New Zealand flagged vessels using longlines only. No more than one vessel per country shall fish at any one time.

2. The total catch of *Dissostichus* spp. in Statistical Subarea 48.6 in the 2005/06 season shall not exceed a precautionary catch limit of 455 tonnes north of 60°S and 455 tonnes south of 60°S.

Catch Limit

3. For the purpose of the exploratory longline fishery for *Dissostichus* spp. in Statistical Subarea 48.6, the 2005/06 season is defined as the period from 1 December 2005 to 30 November 2006.

Season

By-Catch

4. The by-catch in this fishery shall be regulated as set out in Conservation Measure 33–03.

5. The exploratory longline fishery for *Dissostichus* spp. in Statistical Subarea 48.6 shall be carried out in accordance with the provisions of Conservation Measure 25–02, except paragraph 4 (night setting), which shall not apply as long as the requirements of Conservation Measure 24–02 are met.

Mitigation

6. Any vessel catching a total of three (3) seabirds shall immediately revert to night setting in accordance with Conservation Measure 25–02.

7. There shall be no offal discharge in this fishery.

Observers

8. Each vessel participating in the fishery shall have at least two scientific observers, one of whom shall be an observer appointed in accordance with the CCAMLR Scheme of International Scientific Observation, on board throughout all fishing activities within the fishing period.

Data: Catch/Effort

9. For the purpose of implementing this conservation measure in the 2005/06 season, the following shall apply:

(i) The Five-day Catch and Effort Reporting System set out in Conservation Measure 23–01;

(ii) The Monthly Fine-scale Catch and Effort Reporting System set out in Conservation Measure 23–04. Fine-scale data shall be submitted on a haul-by-haul basis.

10. For the purpose of Conservation Measures 23–01 and 23–04, the target species is *Dissostichus* spp. and by-catch species are defined as any species other than *Dissostichus* spp.

Data: Biological

11. Fine-scale biological data, as required under Conservation Measure 23–05, shall be collected and recorded. Such data shall be reported in accordance with the CCAMLR Scheme of International Scientific Observation.

Research

12. Each vessel participating in this exploratory fishery shall conduct fishery-based research in accordance with the Research Plan and Tagging Program described in Conservation Measure 41–01, Annex B and Annex C respectively.

Discharge

13. All vessels participating in this exploratory fishery shall, south of 60°S, be prohibited from discharging:

(i) Oil or fuel products or oily residues into the sea, except as permitted in Annex I of MARPOL 73/78;

(ii) Garbage;

(iii) Food wastes not capable of passing through a screen with openings no greater than 25 mm;

(iv) Poultry or parts (including egg shells);

(v) Sewage within 12 n miles of land or ice shelves, or sewage while the ship is travelling at a speed of less than 4 knots; or

(vi) Incineration ash.

Additional elements

14. No live poultry or other living birds shall be brought into Statistical Subarea 48.6 south of 60°S and any dressed poultry not consumed shall be removed from Statistical Subarea 48.6 south of 60°S.

Conservation Measure 41–05 (2005)

Limits on the Exploratory Fishery for *Dissostichus* spp. in Statistical Division 58.4.2 in the 2005/06 Season

Species toothfish
Area 58.4.2
Season 2005/06
Gear longline

The Commission hereby adopts the following conservation measure in accordance with Conservation Measure 21–02, and notes that this measure would be for one year and that data arising from these activities would be reviewed by the Scientific Committee:

Access

1. Fishing for *Dissostichus* spp. in Statistical Division 58.4.2 shall be limited to the exploratory longline fishery by Australia, Chile, Republic of Korea, New Zealand and Spain. The fishery shall be conducted by one (1) Australian, two (2) Chilean, one (1) Korean, two (2) New Zealand and two (2) Spanish flagged vessels using longlines only.

2. The total catch of *Dissostichus* spp. in Statistical Division 58.4.2 in the 2005/06 season shall not exceed a precautionary catch limit of 780 tonnes, of which no more than 260 tonnes shall be taken in any one of the five small-scale research units (SSRUs) as detailed in Annex B of Conservation Measure 41–01.

Catch Limit

3. Catch limits for each of the SSRUs for Statistical Division 58.4.2, shall be as follows: A – 260 tonnes; B – 0 tonnes; C – 260 tonnes; D – 0 tonnes; E – 260 tonnes.

4. For the purpose of the exploratory longline fishery for *Dissostichus* spp. in Statistical Division 58.4.2, the 2005/06 season is defined as the period from 1 December 2005 to 30 November 2006.

Season

5. The exploratory longline fishery for *Dissostichus* spp. in Statistical Division 58.4.2 shall be carried out in accordance with the provisions of Conservation Measure 41–01, except paragraph 6.

Fishing Operations

6. Fishing will be prohibited in depths less than 550 m in order to protect benthic communities.

By-Catch

7. The by-catch in this fishery shall be regulated as set out in Conservation Measure 33–03.

8. The exploratory longline fishery for *Dissostichus* spp. in Statistical Division 58.4.2 shall be carried out in accordance

with the provisions of Conservation Measure 25–02, except paragraph 4 (night setting) shall not apply, providing that vessels comply with Conservation Measure 24–02.

Mitigation

9. Any vessel catching a total of three (3) seabirds shall immediately revert to night setting in accordance with Conservation Measure 25–02.

10. There shall be no offal discharge in this fishery.

Observers

11. Each vessel participating in the fishery shall have at least two scientific observers, one of whom shall be an observer appointed in accordance with the CCAMLR Scheme of International Scientific Observation, on board throughout all fishing activities within the fishing period.

Research

12. Each vessel participating in this exploratory fishery shall conduct fishery-based research in accordance with the Research Plan and Tagging Program described in Conservation Measure 41–01, Annex B and Annex C respectively.

Data: Catch/Effort

13. For the purpose of implementing this conservation measure in the 2005/06 season, the following shall apply:

(i) The Five-day Catch and Effort Reporting System set out in Conservation Measure 23–01;

(ii) The Monthly Fine-scale Catch and Effort Reporting System set out in Conservation Measure 23–04. Fine-scale data shall be submitted on a haul-by-haul basis.

14. For the purpose of Conservation Measures 23–01 and 23–04, the target species is *Dissostichus* spp. and by-catch species are defined as any species other than *Dissostichus* spp.

Data: Biological

15. Fine-scale biological data, as required under Conservation Measure 23–05, shall be collected and recorded. Such data shall be reported in accordance with the CCAMLR Scheme of International Scientific Observation.

Discharge

16. All vessels participating in this exploratory fishery shall be prohibited from discharging:

(i) Oil or fuel products or oily residues into the sea, except as permitted in Annex I of MARPOL 73/78;

(ii) Garbage;

(iii) Food wastes not capable of passing through a screen with openings no greater than 25 mm;

(iv) poultry or parts (including egg shells);

(v) sewage within 12 n miles of land or ice shelves, or sewage while the ship is travelling at a speed of less than 4 knots; or

(vi) Incineration ash.

Additional Elements

17. No live poultry or other living birds shall be brought into Statistical Division 58.4.2 and any dressed poultry not consumed shall be removed from Statistical Division 58.4.2.

Conservation Measure 41–06 (2005)

Limits on the Exploratory Fishery for *Dissostichus* spp. on Elan Bank (Statistical Division 58.4.3a) Outside Areas of National Jurisdiction in the 2005/06 Season

Species toothfish
Area 58.4.3a
Season 2005/06
Gear longline

The Commission hereby adopts the following conservation measure in accordance with Conservation Measure 21–02:

Access

1. Fishing for *Dissostichus* spp. on Elan Bank (Statistical Division 58.4.3a) outside areas of national jurisdiction shall be limited to the exploratory fishery by Australia, Chile, Republic of Korea and Spain. The fishery shall be conducted by Australian, Korean, Chilean and Spanish flagged vessels using longlines only. No more than one vessel per country shall fish at any one time.

2. The total catch of *Dissostichus* spp. on Elan Bank (Statistical Division 58.4.3a) outside areas of national jurisdiction in the 2005/06 season shall not exceed a precautionary catch limit of 250 tonnes.

Catch Limit

3. For the purpose of the exploratory longline fishery for *Dissostichus* spp. on Elan Bank (Statistical Division 58.4.3a) outside areas of national jurisdiction, the 2005/06 season is defined as the period from 1 May to 31 August 2006, or until the catch limit is reached, whichever is sooner.

Season

By-Catch

4. The by-catch in this fishery shall be regulated as set out in Conservation Measure 33–03.

Mitigation

5. The operation of this fishery shall be carried out in accordance with Conservation Measure 25–02 so as to minimize the incidental mortality of seabirds in the course of fishing.

6. The fishery on Elan Bank (Statistical Division 58.4.3a) outside areas of national jurisdiction, may take place outside the prescribed season (paragraph 3) provided that, prior to entry into force of the licence and prior to entering the Convention Area, each vessel shall demonstrate its capacity to comply with longline weighting as approved by the Scientific Committee and described in Conservation Measure 24–02 and such data shall be reported to the Secretariat immediately.

7. Should a total of three (3) seabirds be caught by a vessel outside the normal season (defined in paragraph 3), the vessel shall cease fishing immediately and shall not be permitted to fish outside the normal fishing season for the remainder of the 2005/06 fishing season.

Observers

8. Each vessel participating in this fishery shall have at least one scientific observer appointed in accordance with the CCAMLR Scheme of International Scientific Observation, and where possible one additional scientific observer, on board throughout all fishing activities within the fishing period.

Data: Catch/Effort

9. For the purpose of implementing this conservation measure in the 2005/06 season, the following shall apply:

(i) The Five-day Catch and Effort Reporting System set out in Conservation Measure 23–01;

(ii) The Monthly Fine-scale Catch and Effort Reporting System set out in Conservation Measure 23–04. Fine-scale data shall be submitted on a haul-by-haul basis.

10. For the purpose of Conservation Measures 23–01 and 23–04, the target species is *Dissostichus* spp. and by-catch species are defined as any species other than *Dissostichus* spp.

Data: Biological

11. Fine-scale biological data, as required under Conservation Measure 23–05, shall be collected and recorded. Such data shall be reported in accordance with the CCAMLR Scheme of International Scientific Observation.

Research

12. Each vessel participating in this exploratory fishery shall conduct fishery-based research in accordance with the Research Plan and Tagging Program described in Conservation

Measure 41–01, Annex B and Annex C respectively.

Conservation Measure 41–07 (2005)

Limits on the Exploratory Fishery for *Dissostichus* spp. on BANZARE Bank (Statistical Division 58.4.3b) Outside Areas of National Jurisdiction in the 2005/06 Season

Species toothfish
Area 58.4.3b
Season 2005/06
Gear longline

The Commission hereby adopts the following conservation measure in accordance with Conservation Measure 21–02:

Access

1. Fishing for *Dissostichus* spp. on BANZARE Bank (Statistical Division 58.4.3b) outside areas of national jurisdiction shall be limited to the exploratory fishery by Australia, Chile, Republic of Korea, Spain and Uruguay. The fishery shall be conducted by Australian, Chilean, Korean, Spanish and Uruguayan flagged vessels using longlines only. No more than one vessel per country shall fish at any one time.

Catch Limit

2. The total catch of *Dissostichus* spp. on BANZARE Bank (Statistical Division 58.4.3b) outside areas of national jurisdiction in the 2005/06 season shall not exceed a precautionary catch limit of 300 tonnes.

3. For the purpose of the exploratory longline fishery for *Dissostichus* spp. on BANZARE Bank (Statistical Division 58.4.3b) outside areas of national jurisdiction, the 2005/06 season is defined as the period from 1 May to 31 August 2006, or until the catch limit is reached, whichever is sooner.

Season

By-Catch

4. The by-catch in this fishery shall be regulated as set out in Conservation Measure 33–03.

Mitigation

5. The operation of this fishery shall be carried out in accordance with Conservation Measure 25–02 so as to minimise the incidental mortality of seabirds in the course of fishing.

6. The fishery on BANZARE Bank (Statistical Division 58.4.3b) outside areas of national jurisdiction, may take place outside the prescribed season (paragraph 3) provided that, prior to entry into force of the licence and prior to entering the Convention Area, each vessel shall demonstrate its capacity to comply with experimental line-weighting trials as approved by the Scientific Committee and described in Conservation Measure 24–02 and such data shall be reported to the Secretariat immediately.

7. Should a total of three (3) seabirds be caught by a vessel outside the normal season (defined in paragraph 3), the vessel shall cease fishing immediately and shall not be permitted to fish outside the normal fishing season for the remainder of the 2005/06 fishing season.

Observers

8. Each vessel participating in this fishery shall have at least one scientific observer appointed in accordance with the CCAMLR Scheme of International Scientific Observation, and where possible one additional scientific observer, on board throughout all fishing activities within the fishing period.

Data: Catch Effort

9. For the purpose of implementing this conservation measure in the 2005/06 season, the following shall apply:

(i) The Five-day Catch and Effort Reporting System set out in Conservation Measure 23–01;

(ii) The Monthly Fine-scale Catch and Effort Reporting System set out in Conservation Measure 23–04. Fine-scale data shall be submitted on a haul-by-haul basis.

10. For the purpose of Conservation Measures 23–01 and 23–04, the target species is *Dissostichus* spp. and by-catch species are defined as any species other than *Dissostichus* spp.

Data: Biological

11. Fine-scale biological data, as required under Conservation Measure 23–05, shall be collected and recorded. Such data shall be reported in accordance with the CCAMLR Scheme of International Scientific Observation.

Research

12. Each vessel participating in this exploratory fishery shall conduct fishery-based research in accordance with the Research Plan and Tagging Program described in Conservation Measure 41–01, Annex B and Annex C respectively.

Conservation Measure 41–08 (2005)

Limits on the Fishery for *Dissostichus* eleginoides in Statistical Division 58.5.2 in the 2005/06 Season

Species toothfish
Area 58.5.2
Season 2005/06
Gear various

1. The fishery for *Dissostichus* eleginoides in Statistical Division 58.5.2 shall be conducted by vessels using trawls, pots or longlines only.

Access

2. The total catch of *Dissostichus* eleginoides in Statistical Division 58.5.2 in the 2005/06 season shall be limited to 2 584 tonnes west of 79°20'E.

Catch Limit

3. For the purpose of the trawl and pot fisheries for *Dissostichus* eleginoides in Statistical Division 58.5.2, the 2005/06 season is defined as the period from 1 December 2005 to 30 November 2006, or until the catch limit is reached, whichever is sooner. For the purpose of the longline fishery for *Dissostichus* eleginoides in Statistical Division 58.5.2, the 2005/06 season is defined as the period from 1 May to 31 August 2006, or until the catch limit is reached, whichever is sooner. The season for longline fishing operations may be extended to 30 September 2006 for any vessel which has demonstrated full compliance with Conservation Measure 25–02 in the 2004/05 season. This extension to the season will also be subject to a catch limit of three (3) seabirds per vessel. If three seabirds are caught during the season extension, fishing shall cease immediately for that vessel.

Season

By-Catch

4. Fishing shall cease if the by-catch of any species reaches its by-catch limit as set out in Conservation Measure 33–02.

Mitigation

5. The operation of the trawl fishery shall be carried out in accordance with Conservation Measure 25–03 so as to minimise the incidental mortality of seabirds and mammals through the course of fishing. The operation of the longline fishery shall be carried out in accordance with Conservation Measure 25–02, except paragraph 4 (night setting) shall not apply for vessels using integrated weighted lines (IWLs). Such vessels may deploy IWL gear during daylight hours if, prior to entry into force of the licence and prior to entering the Convention Area, each vessel shall demonstrate its capacity to comply with experimental line-weighting trials as approved by the Scientific Committee and described in Conservation Measure 24–02.

Observers

6. Each vessel participating in this fishery shall have at least one scientific

observer, and may include one appointed in accordance with the CCAMLR Scheme of International Scientific Observation, on board throughout all fishing activities within the fishing period.

Data: Catch/Effort

7. For the purpose of implementing this conservation measure, the following shall apply:

(i) The Ten-day Catch and Effort Reporting System set out in Annex 41–08/A;

(ii) The Monthly Fine-scale Catch and Effort Reporting System set out in Annex 41–08/A. Fine-scale data shall be submitted on a haul-by-haul basis.

8. For the purpose of Annex 41–08/A, the target species is *Dissostichus* eleginoides and by-catch species are defined as any species other than *Dissostichus* eleginoides.

9. The total number and weight of *Dissostichus* eleginoides discarded, including those with the ''jellymeat'' condition, shall be reported. These fish will count towards the total allowable catch.

Data: Biological

10. Fine-scale biological data, as required under Annex 41–08/A, shall be collected and recorded. Such data shall be reported in accordance with the CCAMLR Scheme of International Scientific Observation.

Annex 41–08/A

Data Reporting System

A ten-day catch and effort reporting system shall be implemented:

(i) For the purpose of implementing this system, the calendar month shall be divided into three reporting periods, viz: day 1 to day 10, day 11 to day 20 and day 21 to the last day of the month. The reporting periods are hereafter referred to as periods A, B and C;

(ii) At the end of each reporting period, each Contracting Party participating in the fishery shall obtain from each of its vessels information on total catch and total days and hours fished for that period and shall, by cable, telex, facsimile or electronic transmission, transmit the aggregated catch and days and hours fished for its vessels so as to reach the Executive Secretary no later than the end of the next reporting period;

(iii) A report must be submitted by every Contracting Party taking part in the fishery for each reporting period for the duration of the fishery, even if no catches are taken;

(iv) The catch of *Dissostichus* eleginoides and of all by-catch species must be reported;

(v) Such reports shall specify the month and reporting period (A, B and C) to which each report refers;

(vi) Immediately after the deadline has passed for receipt of the reports for each period, the Executive Secretary shall notify all Contracting Parties engaged in fishing activities in the division of the total catch taken during the reporting period and the total aggregate catch for the season to date;

(vii) At the end of every three reporting periods, the Executive Secretary shall inform all Contracting Parties of the total catch taken during the three most recent reporting periods and the total aggregate catch for the season to date. A fine-scale catch, effort and biological data reporting system shall be implemented:

(i) The scientific observer(s) aboard each vessel shall collect the data required to complete the CCAMLR fine-scale catch and effort data form C1 for trawl fishing, form C2 for longline fishing, or form C5 for pot fishing, latest versions. These data shall be submitted to the CCAMLR Secretariat not later than one month after the vessel returns to port;

(ii) The catch of *Dissostichus* eleginoides and of all by-catch species must be reported;

(iii) The numbers of seabirds and marine mammals of each species caught and released or killed must be reported;

(iv) The scientific observer(s) aboard each vessel shall collect data on the length composition from representative samples of *Dissostichus* eleginoides and by-catch species:

(a) Length measurements shall be to the nearest centimetre below;

(b) Representative samples of length composition shall be taken from each fine-scale grid rectangle (0.5° latitude by 1° longitude) fished in each calendar month;

(v) The above data shall be submitted to the CCAMLR Secretariat not later than one month after the vessel returns to port.

Conservation Measure 41–09 (2005)

Limits on the Exploratory Fishery for *Dissostichus* spp. in Statistical Subarea 88.1 in the 2005/06 Season

Species toothfish
Area 88.1
Season 2005/06
Gear longline

The Commission hereby adopts the following conservation measure in accordance with Conservation Measure 21–02:

Access

1. Fishing for *Dissostichus* spp. in Statistical Subarea 88.1 shall be limited to the exploratory longline fishery by Argentina, Republic of Korea, New Zealand, Norway, Russia, South Africa, Spain, UK and Uruguay. The fishery shall be conducted by a maximum in the season of two (2) Argentine, two (2) Korean, five (5) New Zealand, one (1) Norwegian, two

(2) Russian, one (1) South African, three (3) Spanish, two (2) UK and three (3) Uruguayan flagged vessels using longlines only.

Catch Limit

2. The total catch of *Dissostichus* spp. in Statistical Subarea 88.1 in the 2005/06 season shall not exceed a precautionary catch limit of 2 964 tonnes applied as follows:

SSRU A—0 tonnes
SSRUs B, C and G—348 tonnes total;
SSRU D—0 tonnes
SSRU E—0 tonnes
SSRU F—0 tonnes
SSRUs H, I and K—1 893 tonnes total
SSRU J—551 tonnes
SSRU L—172 tonnes.

3. For the purpose of the exploratory longline fishery for *Dissostichus* spp. in Statistical Subarea 88.1, the 2005/06 season is defined as the period from 1 December 2005 to 31 August 2006.

Season

Fishing Operations

4. The exploratory longline fishery for *Dissostichus* spp. in Statistical Subarea 88.1 shall be carried out in accordance with the provisions of Conservation Measure 41–01, except paragraph 6.

By-Catch

5. The total by-catch in Statistical Subarea 88.1 in the 2005/06 season shall not exceed a precautionary catch limit of 148 tonnes of skates and rays, and 474 tonnes of Macrourus spp. Within these total by-catch limits, individual limits will apply as follows:

SSRU A—0 tonnes of any species
SSRUs B, C and G total—50 tonnes of skates and rays, 56 tonnes of Macrourus spp., 60 tonnes of other species
SSRU D—0 tonnes of any species
SSRU E—0 tonnes of any species
SSRU F—0 tonnes of any species
SSRUs H, I and K total—95 tonnes of skates and rays, 303 tonnes of Macrourus spp., 60 tonnes of other species
SSRU J—50 tonnes of skates and rays, 88 tonnes of Macrourus spp., 20 tonnes of other species
SSRU L—50 tonnes of skates and rays, 28 tonnes of Macrourus spp., 20 tonnes of other species.

The by-catch in this fishery shall be regulated as set out in Conservation Measure 33–03.

6. The exploratory longline fishery for *Dissostichus* spp. in Statistical Subarea 88.1 shall be carried out in accordance with the provisions of Conservation Measure 25–02, except paragraph 4 (night setting), which shall not apply as long as the requirements of Conservation Measure 24–02 are met.

Mitigation

7. Any vessel catching a total of three (3) seabirds shall immediately revert to night setting in accordance with Conservation Measure 25–02.

8. There shall be no offal discharge in this fishery.

Observers

9. Each vessel participating in the fishery shall have at least two scientific observers, one of whom shall be an observer appointed in accordance with the CCAMLR Scheme of International Scientific Observation, on board throughout all fishing activities within the fishing period.

VMS

10. Each vessel participating in this exploratory longline fishery shall be required to operate a VMS at all times, in accordance with Conservation Measure 10–04.

CDS

11. Each vessel participating in this exploratory longline fishery shall be required to participate in the Catch Documentation Scheme for *Dissostichus* spp., in accordance with Conservation Measure 10–05.

Research

12. Each vessel participating in this exploratory fishery shall conduct fishery-based research in accordance with the Research Plan and Tagging Program described in Conservation Measure 41–01, Annex B and Annex C respectively. The setting of research hauls (Conservation Measure 41–01, Annex B, paragraphs 3 and 4) is not required.

13. Research fishing under Conservation Measure 24–01 shall be limited to 10 tonnes of catch and one vessel in each of SSRUs A, D, E and F during the 2005/06 season. Catches of *Dissostichus* spp. taken in SSRUs E and F under the provisions of Conservation Measure 24–01 shall be considered as part of the catch limit for Statistical Subarea 88.1. Catches of *Dissostichus* spp. taken in SSRUs A and D under the provisions of Conservation Measure 24–01 shall not be considered as part of the catch limit for Statistical Subarea 88.1.

Data: Catch/Effort

14. For the purpose of implementing this conservation measure in the 2005/06 season, the following shall apply:

(i) The Five-day Catch and Effort Reporting System set out in Conservation Measure 23–01;

(ii) The Monthly Fine-scale Catch and Effort Reporting System set out in Conservation Measure 23–04. Fine-scale data shall be submitted on a haul-by-haul basis.

15. For the purpose of Conservation Measures 23–01 and 23–04, the target species is *Dissostichus* spp. and by-catch species are defined as any species other than *Dissostichus* spp.

Data: Biological

16. Fine-scale biological data, as required under Conservation Measure 23–05, shall be collected and recorded. Such data shall be reported in accordance with the CCAMLR Scheme of International Scientific Observation.

Discharge

17. All vessels participating in this exploratory fishery shall be prohibited from discharging:

(i) Oil or fuel products or oily residues into the sea, except as permitted in Annex I of MARPOL 73/78;

(ii) Garbage;

(iii) Food wastes not capable of passing through a screen with openings no greater than 25 mm;

(iv) Poultry or parts (including egg shells);

(v) Sewage within 12 n miles of land or ice shelves, or sewage while the ship is travelling at a speed of less than 4 knots; or

(vi) Incineration ash.

Additional Elements

18. No live poultry or other living birds shall be brought into Statistical Subarea 88.1 and any dressed poultry not consumed shall be removed from Statistical Subarea 88.1.

19. Fishing for *Dissostichus* spp. in Statistical Subarea 88.1 shall be prohibited within 10 n miles of the coast of the Balleny Islands.

Conservation Measure 41–10 (2005)

Limits on the Exploratory Fishery for *Dissostichus* spp. in Statistical Subarea 88.2 in the 2005/06 Season

Species toothfish
Area 88.2
Season 2005/06
Gear longline

The Commission hereby adopts the following conservation measure in accordance with Conservation Measure 21–02:

Access

1. Fishing for *Dissostichus* spp. in Statistical Subarea 88.2 shall be limited to the exploratory longline fishery by Argentina, Republic of Korea, New Zealand, Norway, Russia, Spain, UK and Uruguay. The fishery shall be conducted by a maximum in the season of two (2) Argentine, one (1) Korean, five (5) New Zealand, one (1) Norwegian, two (2) Russian, three (3) Spanish, two (2) UK and one (1) Uruguayan flagged vessels using longlines only.

Catch limit

2. The total catch of *Dissostichus* spp. in Statistical Subarea 88.2 south of 65°S in the 2005/06 season shall not exceed a precautionary catch limit of 487 tonnes applied as follows:

SSRU A—0 tonnes
SSRU B—0 tonnes
SSRUs C, D, F and G—214 tonnes total
SSRU E—273 tonnes.

3. For the purpose of the exploratory longline fishery for *Dissostichus* spp. in Statistical Subarea 88.2, the 2005/06 season is defined as the period from 1 December 2005 to 31 August 2006.

Season

4. The exploratory longline fishery for *Dissostichus* spp. in Statistical Subarea 88.2 shall be carried out in accordance with the provisions of Conservation Measure 41–01, except paragraph 6.

By-Catch

5. The total by-catch in Statistical Subarea 88.2 in the 2005/06 season shall not exceed a precautionary catch limit of 50 tonnes of skates and rays, and 78 tonnes of Macrourus spp. Within these total by-catch limits, individual limits will apply as follows:

SSRU A—0 tonnes of any species
SSRU B—0 tonnes of any species
SSRUs C, D, F, G—50 tonnes of skates and rays, 34 tonnes of Macrourus spp., 20 tonnes of other species in any SSRU;
SSRU E—50 tonnes of skates and rays, 44 tonnes of Macrourus spp., 20 tonnes of other species.

The by-catch in this fishery shall be regulated as set out in Conservation Measure 33–03.

6. The exploratory longline fishery for *Dissostichus* spp. in Statistical Subarea 88.2 shall be carried out in accordance with the provisions of Conservation Measure 25–02, except paragraph 4 (night setting), which shall not apply as long as the requirements of Conservation Measure 24–02 are met.

Mitigation

7. Any vessel catching a total of three (3) seabirds shall immediately revert to night setting in accordance with Conservation Measure 25–02.

8. There shall be no offal discharge in this fishery.

Observers

9. Each vessel participating in the fishery shall have at least two scientific observers, one of whom shall be an observer appointed in accordance with the CCAMLR Scheme of International Scientific Observation, on board throughout all fishing activities within the fishing period.

VMS

10. Each vessel participating in this exploratory longline fishery shall be required to operate a VMS at all times, in accordance with Conservation Measure 10–04.

CDS

11. Each vessel participating in this exploratory longline fishery shall be required to participate in the Catch Documentation Scheme for *Dissostichus* spp., in accordance with Conservation Measure 10–05.

Research

12. Each vessel participating in this exploratory fishery shall conduct fishery-based research in accordance with the Research Plan and Tagging Program described in Conservation Measure 41–01, Annex B and Annex C respectively. The setting of research hauls (Conservation Measure 41–01, Annex B, paragraphs 3 and 4) is not required.

13. Research fishing under Conservation Measure 24–01 shall be limited to 0 tonnes of catch and one vessel in each of SSRUs A and B during the 2005/06 season. Catches of *Dissostichus* spp. taken under the provisions of Conservation Measure 24–01 shall be considered as part of the catch limit for Subarea 88.2.

Data: Catch/Effort

14. For the purpose of implementing this conservation measure in the 2005/06 season, the following shall apply:

(i) The Five-day Catch and Effort Reporting System set out in Conservation Measure 23–01;

(ii) The Monthly Fine-scale Catch and Effort Reporting System set out in Conservation Measure 23–04. Fine-scale data shall be submitted on a haul-by-haul basis.

15. For the purpose of Conservation Measures 23–01 and 23–04, the target species is *Dissostichus* spp. and by-catch species are defined as any species other than *Dissostichus* spp.

Data: Biological

16. Fine-scale biological data, as required under Conservation Measure 23–05, shall be collected and recorded. Such data shall be reported in accordance with the CCAMLR Scheme of International Scientific Observation.

Discharge

17. All vessels participating in this exploratory fishery shall be prohibited from discharging:

(i) Oil or fuel products or oily residues into the sea, except as permitted in Annex I of MARPOL 73/78;

(ii) Garbage;

(iii) Food wastes not capable of passing through a screen with openings no greater than 25 mm;

(iv) Poultry or parts (including egg shells);

(v) Sewage within 12 n miles of land or ice shelves, or sewage while the ship is travelling at a speed of less than 4 knots; or

(vi) Incineration ash.

Additional Elements

18. No live poultry or other living birds shall be brought into Statistical Subarea 88.2 and any dressed poultry not consumed shall be removed from Statistical Subarea 88.2.

Conservation Measure 41–11 (2005)

Limits on the Exploratory Fishery for *Dissostichus* spp. in Statistical Division 58.4.1 in the 2005/06 Season

Species toothfish
Area 58.4.1
Season 2005/06
Gear longline

The Commission hereby adopts the following conservation measure in accordance with Conservation Measure 21–02, and notes that this measure would be for one year and that data arising from these activities would be reviewed by the Scientific Committee:

Access

1. Fishing for *Dissostichus* spp. in Statistical Division 58.4.1 shall be limited to the exploratory longline fishery by Australia, Chile, Republic of Korea, New Zealand, Spain and Uruguay. The fishery shall be conducted by one (1) Australian, two (2) Chilean, two (2) Korean, three (3) New Zealand, two (2) Spanish and one (1) Uruguayan flagged vessels using longlines only.

2. The total catch of *Dissostichus* spp. in Statistical Division 58.4.1 in the 2005/06 season shall not exceed a precautionary catch limit of 600 tonnes, of which no more than 200 tonnes shall be taken in any one of the eight small-scale research units (SSRUs) as detailed in Annex B of Conservation Measure 41–01.

Catch Limit

3. Catch limits for each of the SSRUs for Statistical Division 58.4.1, shall be as follows: A – 0 tonnes; B – 0 tonnes; C – 200 tonnes; D – 0 tonnes; E – 200 tonnes; F – 0 tonnes; G – 200 tonnes; H – 0 tonnes.

4. For the purpose of the exploratory longline fishery for *Dissostichus* spp. in Statistical Division 58.4.1, the 2005/06 season is defined as the period from 1 December 2005 to 30 November 2006.

Season

5. The exploratory longline fishery for *Dissostichus* spp. in Statistical Division 58.4.1 shall be carried out in accordance with the provisions of Conservation Measure 41–01, except paragraph 6.

Fishing Operations

6. Fishing will be prohibited in depths less than 550 m in order to protect benthic communities.

By-catch

7. The by-catch in this fishery shall be regulated as set out in Conservation Measure 33–03.

8. The exploratory longline fishery for *Dissostichus* spp. in Statistical Division 58.4.1 shall be carried out in accordance with the provisions of Conservation Measure 25–02, except paragraph 4 (night setting) shall not apply, providing that vessels comply with Conservation Measure 24–02.

Mitigation

9. Any vessel catching a total of three (3) seabirds shall immediately revert to night setting in accordance with Conservation Measure 25–02.

10. There shall be no offal discharge in this fishery.

Observers

11. Each vessel participating in the fishery shall have at least two scientific observers, one of whom shall be an observer appointed in accordance with the CCAMLR Scheme of International Scientific Observation, on board throughout all fishing activities within the fishing period.

Research

12. Each vessel participating in this exploratory fishery shall conduct fishery-based research in accordance with the Research Plan and Tagging Program described in Conservation Measure 41–01, Annex B and Annex C respectively.

Data: catch/effort

13. For the purpose of implementing this conservation measure in the 2005/06 season, the following shall apply:

(i) The Five-day Catch and Effort Reporting System set out in Conservation Measure 23–01;

(ii) The Monthly Fine-scale Catch and Effort Reporting System set out in Conservation Measure 23–04. Fine-scale data shall be submitted on a haul-by-haul basis.

14. For the purpose of Conservation Measures 23–01 and 23–04, the target species is *Dissostichus* spp. and by-catch species are defined as any species other than *Dissostichus* spp.

Data: Biological

15. Fine-scale biological data, as required under Conservation

Measure 23–05, shall be collected and recorded. Such data shall be reported in accordance with the CCAMLR Scheme of International Scientific Observation.

Discharge

16. All vessels participating in this exploratory fishery shall, south of 60° S, be prohibited from discharging:

(i) Oil or fuel products or oily residues into the sea, except as permitted in Annex I of MARPOL 73/78;

(ii) Garbage;

(iii) Food wastes not capable of passing through a screen with openings no greater than 25 mm;

(iv) Poultry or parts (including egg shells);

(v) Sewage within 12 n miles of land or ice shelves, or sewage while the ship is travelling at a speed of less than 4 knots; or

(vi) Incineration ash.

Additional Elements

17. No live poultry or other living birds shall be brought into Statistical Division 58.4.1 south of 60° S and any dressed poultry not consumed shall be removed from Statistical Division 58.4.1 south of 60°S.

Conservation Measure 42–01 (2005)

Limits on the Fishery for Champsocephalus gunnari in Statistical Subarea 48.3 in the 2005/06 Season

Species icefish
Area 48.3
Season 2005/06
Gear trawl

The Commission hereby adopts the following conservation measure in accordance with Conservation Measure 31–01:

1. The fishery for Champsocephalus gunnari in Statistical Subarea 48.3 shall be conducted by vessels using trawls only. The use of bottom trawls in the directed fishery for Champsocephalus gunnari in Statistical Subarea 48.3 is prohibited.

Access

2. Fishing for Champsocephalus gunnari shall be prohibited within 12 n miles of the coast of South Georgia during the period 1 March to 31 May (spawning period).

3. The total catch of Champsocephalus gunnari in Statistical Subarea 48.3 in the 2005/06 season shall be limited to 2,244 tonnes. Any catch taken between 1 October and 14 November 2005 shall be counted against the catch limit for the 2005/06 fishing season. The total catch of Champsocephalus gunnari taken in the period 1 March to 31 May shall be limited to 561 tonnes.

Catch Limit

4. Where any haul contains more than 100 kg of Champsocephalus gunnari, and more than 10% of the Champsocephalus gunnari by number are smaller than 240 mm total length, the fishing vessel shall move to another fishing location at least 5 n miles distant [1]. The fishing vessel shall not return to any point within 5 n miles of the location where the catch of small Champsocephalus gunnari exceeded 10%, for a period of at least five days [2]. The location where the catch of small Champsocephalus gunnari exceeded 10% is defined as the path followed by the fishing vessel from the point at which the fishing gear was first deployed from the fishing vessel to the point at which the fishing gear was retrieved by the fishing vessel.

5. For the purpose of the trawl fishery for Champsocephalus gunnari in Statistical Subarea 48.3, the 2005/06 season is defined as the period from 15 November 2005 to 14 November 2006, or until the catch limit is reached, whichever is sooner.

Season

By-Catch

6. The by-catch in this fishery shall be regulated as set out in Conservation Measure 33–01. If, in the course of the directed fishery for Champsocephalus gunnari, the by-catch in any one haul of any of the species named in Conservation Measure 33–01

- Is greater than 100 kg and exceeds 5% of the total catch of all fish by weight, or
- Is equal to or greater than 2 tonnes, then the fishing vessel shall move to another location at least 5 n miles distant [1].

The fishing vessel shall not return to any point within 5 n miles of the location where the by-catch of species named in Conservation Measure 33–01 exceeded 5% for a period of at least five days [2]. The location where the by-catch exceeded 5% is defined as the path followed by the fishing vessel from the point at which the fishing gear was first deployed from the fishing vessel to the point at which the fishing gear was retrieved by the fishing vessel.

Mitigation

7. The operation of this fishery shall be carried out in accordance with Conservation Measure 25–03 so as to minimize the incidental mortality of seabirds in the course of the fishery.

8. Should any vessel catch a total of 20 seabirds, it shall cease fishing and shall be excluded from further participation in the fishery in the 2005/06 season.

Observers

9. Each vessel participating in this fishery shall have at least one scientific observer appointed in accordance with the CCAMLR Scheme of International Scientific Observation, and where possible one additional scientific observer, on board throughout all fishing activities within the fishing period.

Data: Catch/Effort

10. For the purpose of implementing this conservation measure in the 2005/06 season, the following shall apply:

(i) The Five-day Catch and Effort Reporting System set out in Conservation Measure 23–01;

(ii) The Monthly Fine-scale Catch and Effort Reporting System set out in Conservation Measure 23–04. Fine-scale data shall be submitted on a haul-by-haul basis.

11. For the purpose of Conservation Measures 23–01 and 23–04, the target species is Champsocephalus gunnari and by-catch species are defined as any species other than Champsocephalus gunnari.

Data: Biological

12. Fine-scale biological data, as required under Conservation Measure 23–05, shall be collected and recorded. Such data shall be reported in accordance with the CCAMLR Scheme of International Scientific Observation.

Research

13. Each vessel operating in this fishery during the period 1 March to 31 May 2006 shall conduct twenty (20) research trawls in the manner described in Annex 42–01/A.

[1] This provision concerning the minimum distance separating fishing locations is adopted pending the adoption of a more appropriate definition of a fishing location by the Commission.

[2] The specified period is adopted in accordance with the reporting period specified in Conservation Measure 23–01, pending the adoption of a more appropriate period by the Commission.

Annex 42–01/A

Research Trawls During Spawning Season

1. All fishing vessels taking part in the fishery for Champsocephalus gunnari in Statistical Subarea 48.3 between 1 March and 31 May shall be required to conduct a minimum of 20 research hauls, to be completed during that period. Twelve research hauls shall be carried out in the Shag Rocks—Black Rocks area. These shall be distributed between the four sectors illustrated in Figure 1: Four each in the NW and SE sectors, and two each in the NE and SW sectors. A further eight research hauls shall be conducted on the northwestern shelf of South Georgia over water less than 300 m deep, as illustrated in Figure 1.

2. Each research haul must be at least 5 n miles distant from all others. The spacing of stations is intended to be such that both areas are adequately covered in order to provide information on the length, sex, maturity and weight composition of Champsocephalus gunnari.

3. If concentrations of fish are located en route to South Georgia, they should be fished in addition to the research hauls.

4. The duration of research hauls must be of a minimum of 30 minutes with the net at fishing depth. During the day, the net must be fished close to the bottom.

5. The catch of all research hauls shall be sampled by the international scientific observer on board. Samples should aim to comprise at least 100 fish, sampled using standard random sampling techniques. All fish in the sample should be at least examined for length, sex and maturity determination, and where possible weight. More fish should be examined if the catch is large and time permits.

Figure 1: Distribution of 20 research hauls on Champsocephalus gunnari at Shag Rocks (12) and South Georgia (8) from 1 March to 31 May. Haul locations around South Georgia (stars) are illustrative.

Conservation Measure 42–02 (2005)

Limits on the Fishery for Champsocephalus gunnari in Statistical Division 58.5.2 in the 2005/06 Season

Species icefish
Area 58.5.2
Season 2005/06
Gear trawl

Access

1. The fishery for Champsocephalus gunnari in Statistical Division 58.5.2 shall be conducted by vessels using trawls only.

For the purpose of this fishery for Champsocephalus gunnari, the area open to the fishery is defined as that portion of Statistical Division 58.5.2 that lies within the area enclosed by a line:

(i) Starting at the point where the meridian of longitude 72°15′E intersects the Australia—France Maritime Delimitation Agreement Boundary then south along the meridian to its intersection with the parallel of latitude 53°25′S; 2.

(ii) Then east along that parallel to its intersection with the meridian of longitude 74°E;

(iii) Then northeasterly along the geodesic to the intersection of the parallel of latitude 52°40′S and the meridian of longitude 76°E;

(iv) Then north along the meridian to its intersection with the parallel of latitude 52°S;

(v) Then northwesterly along the geodesic to the intersection of the parallel of latitude 51°S with the meridian of longitude 74°30′E;

(vi) Then southwesterly along the geodesic to the point of commencement.

3. A chart illustrating the above definition is appended to this conservation measure (Annex 42–02/A). Areas in Statistical Division 58.5.2 outside that defined above shall be closed to directed fishing for Champsocephalus gunnari.

Catch Limit

4. The total catch of Champsocephalus gunnari in Statistical Division 58.5.2 in the 2005/06 season shall be limited to 1 210 tonnes.

5. Where any haul contains more than 100 kg of Champsocephalus gunnari, and more than 10% of the Champsocephalus gunnari by number are smaller than the specified minimum legal total length, the fishing vessel shall move to another fishing location at least 5 n miles distant [1]. The fishing vessel shall not return to any point within 5 n miles of the location where the catch of small Champsocephalus gunnari exceeded 10% for a period of at least five days [2]. The location where the catch of small Champsocephalus gunnari exceeded 10% is defined as the path followed by the fishing vessel from the point at which the fishing gear was first deployed from the fishing vessel to the point at which the fishing gear was retrieved by the fishing vessel. The minimum legal total length shall be 240 mm.

Season

6. For the purpose of the trawl fishery for Champsocephalus gunnari in Statistical Division 58.5.2, the 2005/06 season is defined as the period from 1 December 2005 to 30 November 2006, or until the catch limit is reached, whichever is sooner.

By-Catch

7. Fishing shall cease if the by-catch of any species reaches its by-catch limit as set out in Conservation Measure 33–02.

Mitigation

8. The operation of this fishery shall be carried out in accordance with Conservation Measure 25–03 so as to minimise the incidental mortality of seabirds in the course of fishing.

Observers

9. Each vessel participating in this fishery shall have at least one scientific observer, and may include one appointed in accordance with the CCAMLR Scheme of International Scientific Observation, on board throughout all fishing activities within the fishing period.

Data: Catch/Effort

10. For the purpose of implementing this conservation measure in the 2005/06 season, the following shall apply:

(i) The Ten-day Catch and Effort Reporting System set out in Annex 42–02/B;

(ii) The Monthly Fine-scale Catch and Effort Reporting System set out in Annex 42–02/B. Fine-scale data shall be submitted on a haul-by-haul basis.

11. For the purpose of Annex 42–02/B, the target species is Champsocephalus gunnari and by-catch species are defined as any species other than Champsocephalus gunnari.

Data: Biological

12. Fine-scale biological data, as required under Annex 42–02/B, shall be collected and recorded. Such data shall be reported in accordance with the CCAMLR Scheme of International Scientific Observation.

[1] This provision concerning the minimum distance separating fishing locations is adopted pending the adoption of a more

appropriate definition of a fishing location by the Commission.

[2] The specified period is adopted in accordance with the reporting period specified in Conservation Measure 23–01, pending the adoption of a more appropriate period by the Commission.

ANNEX 42–02/A

CHART OF THE HEARD ISLAND PLATEAU

ANNEX 42–02/B

DATA REPORTING SYSTEM

A ten-day catch and effort reporting system shall be implemented:

(i) For the purpose of implementing this system, the calendar month shall be divided into three reporting periods, viz: day 1 to day 10, day 11 to day 20 and day 21 to the last day of the month. The reporting periods are hereafter referred to as periods A, B and C;

(ii) At the end of each reporting period, each Contracting Party participating in the fishery shall obtain from each of its vessels information on total catch and total days and hours fished for that period and shall, by cable, telex, facsimile or electronic transmission, transmit the aggregated catch and days and hours fished for its vessels so as to reach the Executive Secretary no later than the end of the next reporting period;

(iii) A report must be submitted by every Contracting Party taking part in the fishery for each reporting period for the duration of the fishery, even if no catches are taken;

(iv) The catch of Champsocephalus gunnari and of all by-catch species must be reported;

(v) Such reports shall specify the month and reporting period (A, B and C) to which each report refers;

(vi) Immediately after the deadline has passed for receipt of the reports for each period, the Executive Secretary shall notify all Contracting Parties engaged in fishing activities in the division of the total catch taken during the reporting period and the total aggregate catch for the season to date;

(vii) At the end of every three reporting periods, the Executive Secretary shall inform all Contracting Parties of the total catch taken during the three most recent reporting periods and the total aggregate catch for the season to date.

A fine-scale catch, effort and biological data reporting system shall be implemented:

(i) The scientific observer(s) aboard each vessel shall collect the data required to complete the CCAMLR fine-scale catch and effort data form C1, latest version. These data shall be submitted to the CCAMLR Secretariat not later than one month after the vessel returns to port;

(ii) The catch of Champsocephalus gunnari and of all by-catch species must be reported;

(iii) The numbers of seabirds and marine mammals of each species caught and released or killed must be reported;

(iv) The scientific observer(s) aboard each vessel shall collect data on the length composition from representative samples of Champsocephalus gunnari and by-catch species:

(a) Length measurements shall be to the nearest centimetre below;

(b) Representative samples of length composition shall be taken from each fine-scale grid rectangle (0.5° latitude by 1° longitude) fished in each calendar month;

(v) The above data shall be submitted to the CCAMLR Secretariat not later than one month after the vessel returns to port.

Conservation Measure 52–01 (2005)

Limits on the Fishery for Crab in Statistical Subarea 48.3 in the 2005/06 Season

Species crab
Area 48.3
Season 2005/06
Gear pot

The Commission hereby adopts the following conservation measure in accordance with Conservation Measure 31–01:

Access

1. The fishery for crab in Statistical Subarea 48.3 shall be conducted by vessels using pots only. The crab fishery is defined as any commercial harvest activity in which the target species is any member of the crab group (Order Decapoda, Suborder Reptantia).

2. The crab fishery shall be limited to one vessel per Member.

3. Each Member intending to participate in the crab fishery shall notify the CCAMLR Secretariat at least three months in advance of starting fishing of the name, type, size, registration number, radio call sign, and research and fishing operations plan of the vessel that the Member has authorised to participate in the crab fishery.

Catch Limit

4. The total catch of crab in Statistical Subarea 48.3 in the 2005/06 season shall not exceed a precautionary catch limit of 1 600 tonnes.

5. The crab fishery shall be limited to sexually mature male crabs—all female and undersized male crabs caught shall be released unharmed. In the case of Paralomis spinosissima and Paralomis formosa, males with a minimum carapace width of 94 and 90 mm respectively, may be retained in the catch.

Season

6. For the purpose of the pot fishery for crab in Statistical Subarea 48.3, the 2005/06 season is defined as the period from 1 December 2005 to 30 November 2006, or until the catch limit is reached, whichever is sooner.

7. The by-catch of *Dissostichus* eleginoides shall be counted against the catch limit in the fishery for *Dissostichus* eleginoides in Statistical Subarea 48.3.

By-Catch

Observers

8. Each vessel participating in this fishery shall have at least one scientific observer appointed in accordance with the CCAMLR Scheme of International Scientific Observation, and where possible one additional scientific observer, on board throughout all fishing activities within the fishing period. Scientific observers shall be afforded unrestricted access to the catch for statistical random sampling prior to, as well as after, sorting by the crew.

Data: Catch/Effort

9. For the purpose of implementing this conservation measure in the 2005/06 season, the following shall apply:

(i) The Ten-day Catch and Effort Reporting System set out in Conservation Measure 23–02;

(ii) The Monthly Fine-scale Catch and Effort Reporting System set out in Conservation Measure 23–04. Fine-scale data shall be submitted on a haul-by-haul basis.

10. For the purpose of Conservation Measures 23–02 and 23–04 the target species is crab and by-catch species are defined as any species other than crab.

Data: Biological

11. Fine-scale biological data, as required under Conservation Measure 23–05, shall be collected and recorded. Such data shall be reported in accordance with the CCAMLR Scheme of International Scientific Observation.

Research

12. Each vessel participating in this exploratory fishery shall conduct fishery-based research in accordance with the data requirements described in Annex 52–01/A and the experimental harvest regime described in Conservation Measure 52–02. Data collected for the period up to 31 August 2006 shall be reported to CCAMLR by 30 September 2006 so that the data will be available to the meeting of the Working Group on Fish Stock Assessment (WG–FSA) in 2006. Such data collected after 31 August 2006 shall be reported to CCAMLR not later than three months after the closure of the fishery.

Annex 52–01/A

Data Requirements on the Crab Fishery in Statistical Subarea 48.3

Catch and Effort Data:

Cruise Descriptions

Cruise code, vessel code, permit number, year.

Pot Descriptions

Diagrams and other information, including pot shape, dimensions, mesh size, funnel position, aperture and orientation, number of chambers, presence of an escape port.

Effort Descriptions

Date, time, latitude and longitude of the start of the set, compass bearing of the set, total number of pots set, spacing of pots on the line, number of pots lost, depth, soak time, bait type.

Catch Descriptions

Retained catch in numbers and weight, by-catch of all species (see Table 1), incremental record number for linking with sample information.

Table 1: Data requirements for by-catch species in the crab fishery in Statistical Subarea 48.3.

Species Data requirements

Dissostichus eleginoides Numbers and estimated total weight

Notothenia rossii Numbers and estimated total weight

Other species Estimated total weight

Biological Data: For these data, crabs are to be sampled from the line hauled just prior to noon, by collecting the entire contents of a number of pots spaced at intervals along the line so that between 35 and 50 specimens are represented in the subsample.

Cruise Descriptions

Cruise code, vessel code, permit number.

Sample Descriptions

Date, position at start of the set, compass bearing of the set, line number.

Data

Species, sex, length of at least 35 individuals, presence/absence of rhizocephalan parasites, record of the destination of the crab (kept, discarded, destroyed), record of the pot number from which the crab comes.

Conservation Measure 52–02 (2005)

Experimental Harvest Regime for the Crab Fishery in Statistical Subarea 48.3 in the 2005/06 Season

Species crab
Area 48.3
Se 20 ason 05/06
Gear pot

The following measures apply to all crab fishing within Statistical Subarea 48.3 in the 2005/06 fishing season. Every vessel participating in the crab fishery in Statistical Subarea 48.3 shall conduct fishing operations in accordance with an experimental harvest regime as outlined below:

1. Vessels shall conduct the experimental harvest regime in the 2005/06 season at the start of their first season of participation in the crab fishery and the following conditions shall apply:

(i) Every vessel when undertaking an experimental harvesting regime shall expend its first 200 000 pot hours of effort within a total area delineated by twelve blocks of 0.5° latitude by 1.0° longitude. For the purposes of this conservation measure, these blocks shall be numbered A to L. In Annex 52–02/A, the blocks are illustrated (Figure 1), and the geographic position is denoted by the coordinates of the northeast corner of the block. For each string, pot hours shall be calculated by taking the total number of pots on the string and multiplying that number by the soak time (in hours) for that string. Soak time shall be defined for each string as the time between start of setting and start of hauling;

(ii) Vessels shall not fish outside the area delineated by the 0.5° latitude by 1.0° longitude blocks prior to completing the experimental harvesting regime;

(iii) Vessels shall not expend more than 30 000 pot hours in any single block of 0.5° latitude by 1.0° longitude;

(iv) If a vessel returns to port before it has expended 200 000 pot hours in the experimental harvesting regime, the remaining pot hours shall be expended before it can be considered that the vessel has completed the experimental harvesting regime;

(v) After completing 200 000 pot hours of experimental fishing, it shall be considered that vessels have completed the experimental harvesting regime and they shall be permitted to commence fishing in a normal fashion.

2. Data collected during the experimental harvest regime up to 30 June 2006 shall be submitted to CCAMLR by 31 August 2006.

3. Normal fishing operations shall be conducted in accordance with the regulations set out in Conservation Measure 52–01.

4. For the purposes of implementing normal fishing operations after completion of the experimental harvest regime, the Ten-day Catch and Effort Reporting System set out in Conservation Measure 23–02 shall apply.

5. Vessels that complete experimental harvest regime shall not be required to conduct experimental fishing in future seasons. However, these vessels shall abide by the guidelines set forth in Conservation Measure 52–01.

6. Fishing vessels shall participate in the experimental harvest regime independently (i.e. vessels may not cooperate to complete phases of the experiment).

7. Crabs taken by any vessel for research purposes will be considered as part of any catch limits in force for each species taken, and shall be reported to CCAMLR as part of the annual STATLANT returns.

8. All vessels participating in the experimental harvest regime shall carry at least one scientific observer on board during all fishing activities.

Annex 52–02/A

Locations of Fishing Areas for the Experimental Harvest Regime of the Exploratory Crab Fishery

AA BB CC DD EE FF GG
M
Y
N Q
U
O
R V
P
S
W
T
X Z
HH
II

Figure 1: Operations area for Phase 1 of the experimental harvest regime for the crab fishery in Statistical Subarea 48.3.

Conservation Measure 61–01 (2005)

Limits on the Exploratory Fishery for Martialia hyadesi in Statistical Subarea 48.3 in the 2005/06 Season

Species squid
Area 48.3
Season 2005/06
Gear jig

The Commission hereby adopts the following conservation measure in accordance with Conservation Measures 21–02 and 31–01:

Access

1. Fishing for Martialia hyadesi in Statistical Subarea 48.3 shall be limited to the exploratory jig fishery by notifying countries. The fishery shall be conducted by vessels using jigs only.

2. The total catch of Martialia hyadesi in Statistical Subarea 48.3 in the 2005/06 season shall not exceed a precautionary catch limit of 2 500 tonnes.

Catch Limit

3. For the purpose of the exploratory jig fishery for Martialia hyadesi in Statistical Subarea 48.3, the 2005/06 season is defined as the period from 1 December 2005 to 30 November 2006, or until the catch limit is reached, whichever is sooner.

Season

Observers

4. Each vessel participating in this fishery shall have at least one scientific observer appointed in accordance with the CCAMLR Scheme of International Scientific Observation, and where possible one additional scientific observer, on board throughout all fishing activities within the fishing period.

Data: Catch/Effort

5. For the purpose of implementing this conservation measure in the 2005/06 season, the following shall apply:

(i) The Ten-day Catch and Effort Reporting System set out in Conservation Measure 23–02;

(ii) The Monthly Fine-scale Catch and Effort Reporting System set out in Conservation Measure 23–04. Fine-scale data shall be submitted on a haul-by-haul basis.

6. For the purpose of Conservation Measures 23–02 and 23–04, the target species is Martialia hyadesi and by-catch species are defined as any species other than Martialia hyadesi.

Data: Biological

7. Fine-scale biological data, as required under Conservation Measure 23–05, shall be collected and recorded. Such data shall be reported in accordance with the CCAMLR Scheme of International Scientific Observation.

Research

8. Each vessel participating in this exploratory fishery shall collect data in accordance with the Data Collection Plan described in Annex 61–01/A. Data collected pursuant to the plan for the period up to 31 August 2006 shall be reported to CCAMLR by 30 September 2006 so that the data will be available to the meeting of the Working Group on Fish Stock Assessment (WG–FSA) in 2006.

Annex 61–01/A

Data Collection Plan for Exploratory Squid (Martialia Hyadesi) Fisheries in Statistical Subarea 48.3

1. All vessels will comply with conditions set by CCAMLR. These include data required to complete the data form (Form TAC) for the Ten-day Catch and Effort Reporting System, as specified by Conservation Measure 23–02; and data required to complete the CCAMLR standard fine-scale catch and effort data form for a squid jig fishery (Form C3). This includes numbers of seabirds and marine mammals of each species caught and released or killed.

2. All data required by the CCAMLR Scientific Observers Manual for squid fisheries will be collected. These include:

(i) Vessel and observer program details (Form S1);

(ii) Catch information (Form S2);

(iii) Biological data (Form S3).

Resolution 24/XXIV

Non-Contracting Party Cooperation Enhancement Program

The Commission, Concerned that illegal, unreported and unregulated (IUU) fishing vessels are increasingly conducting their fishing operations under flags of non-Contracting Parties and moving their catches through ports of non-Contracting Parties to circumvent CCAMLR rules, Believing that this problem should be addressed by encouraging cooperation between non-Contracting Parties and CCAMLR through:

1. The exchange of information about IUU fishing with CCAMLR;

2. Participation in key CCAMLR initiatives, such as the Catch Documentation Scheme for *Dissostichus* spp. (CDS), through implementation of conservation measures;

3. Acceding to the Convention and/or joining the Commission, as appropriate,

Noting that some non-Contracting Party States wish to cooperate with CCAMLR but lack the capacity to do so,

Recognising that a structured program of technical cooperation to build the capacity of key non-Contracting Party Flag and Port States would assist them to combat IUU fishing activity and trade and support wider implementation of CCAMLR conservation measures,

Noting that for its cooperation enhancement program to be effective Members will need to commit, support and be willing to deliver technical assistance, advice and training to non-Contracting Parties,

1. Recommends that Members consider, at CCAMLR–XXV, the development of a cooperation enhancement program with the following attributes:

(i) A focus on technical cooperation;

(ii) Flexibility to tailor cooperation to meet the needs of both the Commission and the recipient State on a case-by-case basis;

(iii) A partnership model involving the CCAMLR Secretariat, experienced CCAMLR Member(s) as sponsors and the recipient States(s);

(iv) Matching of sponsors and recipients based on expertise, historical relationships between States and proximity;

(v) Central repository of information and training material by the CCAMLR Secretariat.

2. Decides to establish a priority list of States that may benefit from technical cooperation and develop clear criteria for investing in cooperation enhancement.

Dated: January 11, 2006.

Margaret F. Hayes,

Director, Office of Oceans Affairs, Department of State.

[FR Doc. 06–503 Filed 1–25–06; 8:45 am]

BILLING CODE 3510–22–P

Federal Register

Thursday,
January 26, 2006

Part III

Department of Education

Office of Innovation and Improvement; Overview Information; Transition to Teaching Grant Program; Notice Inviting Applications for New Awards for Fiscal Year (FY) 2006; Notice

DEPARTMENT OF EDUCATION

Office of Innovation and Improvement; Overview Information; Transition to Teaching Grant Program; Notice Inviting Applications for New Awards for Fiscal Year (FY) 2006

Catalog of Federal Domestic Assistance (CFDA) Number: 84.350A, 84.350B, and 84.350C.

Dates: Applications Available: January 27, 2006. Deadline for Notice of Intent to Apply: February 21, 2006. Deadline for Transmittal of Applications: March 20, 2006. Deadline for Intergovernmental Review: May 19, 2006.

Eligible Applicants: A State educational agency (SEA); a high-need local educational agency (LEA); a for-profit or nonprofit organization that has a proven record of effectively recruiting and retaining highly qualified teachers, in a partnership with a high-need LEA or an SEA; an institution of higher education (IHE), in a partnership with a high-need LEA or an SEA; a regional consortium of SEAs; or a consortium of high-need LEAs. For further information on whether an LEA qualifies as a ''high-need LEA,'' see section III. 1. *Eligible Applicants* in this notice.

Estimated Available Funds: $5–6 million. The Department has established separate funding categories for projects of different scope. These categories are:

(1) National/regional projects (84.350C) that serve eligible high-need LEAs in more than one State;

(2) Statewide projects (84.350B) that serve eligible high-need LEAs statewide or eligible high-need LEAs in more than one area of a State; and

(3) Local projects (84.350A) that serve one eligible high-need LEA or two or more eligible high-need LEAs in a single area of a State.

Estimated Range of Awards: National/regional projects—$300,000–$1,000,000 per year; Statewide projects—$150,000–$600,000 per year; and Local projects—$100,000–$400,000 per year.

Estimated Average Size of Awards: National/regional projects—$750,000 per year; Statewide projects—$375,000 per year; and Local projects—$225,000 per year.

Estimated Number of Awards: National/regional projects—2; Statewide projects—5; and Local projects—10.

Note: The Department is not bound by any estimates in this notice.

Project Period: Up to 60 months. Full Text of Announcement

I. Funding Opportunity Description

Purpose of Program: The Transition to Teaching program encourages (1) the development and expansion of alternative routes to full State teacher certification, as well as (2) the recruitment and retention of highly qualified mid-career professionals, recent college graduates who have not majored in education, and highly qualified paraprofessionals as teachers in high-need schools operated by high-need LEAs, including charter schools that operate as high-need LEAs.

Priorities: The Department has established three competitive preference priorities and one invitational priority that are explained in the following paragraphs. One competitive preference priority is from the statute for this program and the other two competitive preference priorities are from the notice of final priorities and requirements for this program, published in the **Federal Register** on April 30, 2004 (69 FR 24002, 24005)(NFP).

Competitive Preference Priorities: For FY 2006, these priorities are competitive preference priorities. Under 34 CFR 75.105(c)(2)(i), we award 5 additional points to an application that meets Competitive Preference Priority 1, and up to an additional 20 points to an application, depending on how well the application meets either Competitive Preference Priority 2 or 3. These points are in addition to any points the application earns under the program's selection criteria.

These priorities are:

Competitive Preference Priority 1—Partnerships or Consortia That Include a High-Need LEA or a High-Need SEA

In accordance with 34 CFR 75.105(b)(2)(iv), this priority is from section 2313(c) of the Elementary and Secondary Education Act of 1965, as amended (ESEA) (20 U.S.C. 6683(c)). This priority supports projects that are designed and implemented in active partnerships or consortia that include at least one high-need LEA or high-need SEA.

Competitive Preference Priority 2—State Projects To Create or Expand, and Then Implement, Alternative Pathways to Teacher Certification

This priority is from the NFP (69 FR 24002, 20005). This priority supports projects designed and implemented by an SEA or a consortium of SEAs and the respective teacher certification agency of each State (if different from the SEA) to create or expand, and then implement, alternative pathways to certification. The project period is up to five years. Grantees will need to conduct both of the following activities:

(a) *Create alternatives to the State's traditional certification requirements.* In conducting this activity, States are encouraged to develop a variety of alternative pathways to certification as important options in their menu of State-approved procedures for teacher certification and licensure. For example, competency-based alternative routes would permit talented individuals interested in teaching to become fully certified through rigorous assessments of their content and professional teaching competence, thereby enabling LEAs to recruit from a larger and more talented pool of prospective teachers.

(b) *Use the alternative routes to recruit individuals from groups eligible to participate in the Transition to Teaching program.* Funded projects also would, among other things, need to work with participating high-need LEAs to—

(1) Increase the number and quality of mid-career changers, recent college graduates who have not majored in education, and qualified paraprofessionals recruited to teach high-need subjects (such as mathematics, science, and special education) in identified high-need LEAs (which may include LEAs that are charter schools), particularly those in urban and rural areas; and

(2) Provide these newly hired teachers with the support they need to become certified and effective teachers who will choose to make teaching their new long-term profession.

In particular, SEAs receiving project funds must—

(i) Target recruitment efforts on, and rigorously screen, candidates in areas where participating high-need LEAs have documented teacher shortages (*e.g.,* mathematics, science, and special education);

(ii) Place prospective teachers only in high-need schools operated by high-need LEAs;

(iii) Prepare individuals for specific positions in specific LEAs and place them in these positions early in the training process;

(iv) Ensure that recruited teachers receive the specific training they need to become fully certified or licensed teachers; and

(v) Have recruited teachers participate in a well-supervised induction period that may include the support of experienced, trained mentors.

Note: Applicants that choose to respond to Competitive Preference Priority 2 may do so however they choose. Those who respond to this priority may want to consider addressing such key factors as: (1) The data and other information the State has used to assess how and the extent to which current State certification requirements inhibit talented individuals from entering teaching; (2) the

level of commitment of State leaders and policymakers to developing new or enhanced alternative certification requirements; (3) the State's statutory and regulatory authority to implement alternative pathways to certification; (4) how the SEA and other participating State agencies will actively involve all stakeholders with responsibility or authority for teacher preparation, hiring, and retention; and (5) a timeline for major actions that the SEA and other participating State agencies intend to implement to develop new or improved alternative pathways to teacher certification.

Competitive Preference Priority 3—District Projects to Streamline Teacher Hiring Systems, Timelines, and Processes

This priority is from the NFP (69 FR 24002, 20005). The priority supports projects by one or more LEAs to streamline their hiring systems, timelines, and processes. The project period is up to five years. A participating high-need LEA will need to conduct both of the following activities:

(a) *Examine its current hiring system, processes, and policies to identify the critical barriers to hiring highly qualified teachers.* The lack of highly qualified teachers in most urban and rural LEAs has often been attributed to their difficulty in recruiting interested and qualified individuals. However, recent research indicates that the problem may not be one of recruitment but may stem from inefficient and untimely LEA hiring systems and processes. This is especially true in high-poverty LEAs and schools—the very LEAs and schools the Transition to Teaching program is targeted to serve. Accordingly, each participating LEA will need to examine its current hiring processes and policies and, based upon that examination, identify the critical barriers to hiring highly qualified teachers.

(b) *Design and implement efforts to remove the identified barriers and put in place systems that streamline and revamp the hiring process.* In conducting this activity, LEAs are encouraged to create an efficient and timely applicant hiring process with a strong data tracking system and clear hiring goals. These efforts also should involve negotiating policy reforms that remove critical barriers, such as delayed notification of vacancies and seniority and retirement rules.

Participating LEAs also will carry out the requirements of the Transition to Teaching program by recruiting nontraditional candidates, using the streamlined hiring system to hire these individuals for teaching in high-need schools, working with them to achieve full State certification, and retaining them for at least three years.

Note: Applicants that choose to respond to Competitive Preference Priority 3 may do so however they choose. Those that respond to this priority may want to consider addressing such key factors as: (1) The existing barriers to early notification and hiring of new teachers; (2) the active engagement of LEA officials, teacher unions, and other stakeholders in developing a plan to remove existing barriers and implementing changes; (3) the actions each participating LEA intends to undertake to implement policies and systems for early notification and hiring of new teachers; and (4) a timeline for major action steps that each participating LEA intends to implement to develop the new hiring policies and systems.

Under this competition, we are particularly interested in applications that address the following priority. *Invitational Priority:* For FY 2006 this priority is an invitational priority. Under 34 CFR 75.105(c)(1) we do not give an application that meets this invitational priority a competitive or absolute preference over other applications.

This priority is:

Invitational Priority—Recruitment and Retention of Teachers of Mathematics or Science at the High School Level

This priority supports projects that focus on the recruitment, preparation, placement, support, and retention of mid-career professionals, including highly qualified paraprofessionals, and recent college graduates who did not major in education to serve as mathematics or science teachers in high schools that are high-need schools in high-need LEAs.

Note: Applicants are encouraged to identify high-need high schools in high-need LEAs with a shortage of mathematics or science teachers, and recruit qualified individuals as teachers for these schools. In addition, applicants are encouraged to address how their efforts to recruit and retain mathematics and science teachers through the Transition to Teaching program can support other reform efforts in the high-need schools and districts to improve the quality of instruction in mathematics, science, and high schools in general.

Note: The NFP includes definitions for terms used in these priorities, including ''highly qualified paraprofessional,'' ''high-need subject,'' and ''high-need SEA.''

Program Authority: 20 U.S.C. 6681–6684.

Applicable Regulations: (a) The Education Department General Administrative Regulations (EDGAR) in 34 CFR parts 74, 75, 77, 79, 80, 81, 82, 84, 85, 86, 97, 98 and 99. (b) The notice of final priorities and requirements for this program published in the **Federal Register** on April 30, 2004 (69 FR 24002).

Note: The regulations in 34 CFR part 86 apply to IHEs only.

II. Award Information

Type of Award: Discretionary grants.

Estimated Available Funds: $5–6 million. The Department has established separate funding categories for projects of a different scope. These categories are:

(1) National/regional projects (84.350C) that serve eligible high-need LEAs in more than one State;

(2) Statewide projects (84.350B) that serve eligible high-need LEAs statewide or eligible high-need LEAs in more than one area of a State; and

(3) Local projects (84.350A) that serve one eligible high-need LEA or two or more eligible high-need LEAs in a single area of a State.

Estimated Range of Awards: National/regional projects—$300,000–$1,000,000 per year; Statewide projects—$150,000–$600,000 per year; and Local projects—$100,000–$400,000 per year.

Estimated Average Size of Awards: National/regional projects—$750,000 per year; Statewide projects—$375,000 per year; and Local projects—$225,000 per year.

Estimated Number of Awards: National/regional projects—2; Statewide projects—5; and Local projects—10.

Note: The Department is not bound by any estimates in this notice.

Project Period: Up to 60 months.

III. Eligibility Information

1. *Eligible Applicants:* An SEA; a high-need LEA; a for-profit or nonprofit organization that has a proven record of effectively recruiting and retaining highly qualified teachers, in a partnership with a high-need LEA or an SEA; an IHE, in a partnership with a high-need LEA or an SEA; a regional consortium of SEAs; or a consortium of high-need LEAs. Each application must identify participating LEAs that meet the definition of ''high-need LEA'' in section 2102(3) of the ESEA.

Note: Section 2102(3) of the ESEA defines a high-need LEA as an LEA—

(a) That serves not fewer than 10,000 children from families with incomes below the poverty line (as that term is defined in section 9101(33) of the ESEA), or for which not less than 20 percent of the children served by the LEA are from families with incomes below the poverty line; and

(b) For which there is (1) a high percentage of teachers not teaching in the academic subjects or grade levels that the teachers were trained to teach, or (2) a high percentage of

teachers with emergency, provisional, or temporary certification or licensing.

The NFP describes how applicants must demonstrate that a participating LEA meets this statutory definition of ''high-need LEA.'' (See 69 FR 24002, 24006) Pursuant to the NFP, we provide the following supplementary information regarding the data applicants use to demonstrate eligibility as a ''high-need LEA'' under this competition:

As described in the NFP, absent a showing of alternative LEA data that reliably show the number of children from families with incomes below the poverty line that are served by the LEA, the eligibility of an LEA as a ''high-need LEA'' under component (a) of the definition must be determined on the basis of the most recent U.S. Census Bureau data. The most recent U.S. Census Bureau data can be found in the charts on the Internet at: *http://www.census.gov/housing/saipe/sd03/* The Department examines the eligibility of any LEA not listed on these charts on a case-by-case basis.

As discussed in the NFP, with respect to component (b)(1) of the definition of ''high-need LEA,'' whether an LEA has a ''high percentage of teachers not teaching in the academic subjects or grade levels that the teachers were trained to teach'' is determined on a case-by-case basis.

In addition, as noted in the NFP, with respect to component (b)(2) of the definition of ''high-need LEA,'' an LEA has a ''high percentage'' of teachers with emergency, provisional, or temporary certification or licensing if the percentage of teachers on waivers, as the LEA reported to the State for purposes of the State's latest report to the Secretary under section 207 of the Higher Education Act of 1965 (HEA), was at least the national average percentage of teachers on waivers of State certification for all LEAs. As outlined in the NFP, the Secretary determines the national average percentage of teachers on waivers based on data contained in the most currently available HEA section 207 State reports. At the time of publication of this notice, the Department has received all 2005 State HEA section 207 reports and those reports reflect a national average percentage of teachers on waivers of State certification in all LEAs of 2.5 percent.

Because the Department is in the process of certifying all data received in the 2005 State HEA section 207 reports, the data in these reports, including the national average of teachers on waivers of State certification, are still provisional. However, to provide adequate time for the preparation and review of project applications and award of new grants before FY 2006 program funds lapse on September 30, 2006, the Department will use the 2.5 percent national average for purposes of this competition. Accordingly, an LEA will be considered to have met component (b)(2) of the definition of ''high-need LEA'' if the data that it provided to the State for purposes of the State's October 2005 HEA section 207 report demonstrate that at least 2.5 percent of its teachers were on waivers of State certification requirements.

2. *Cost Sharing or Matching:* This program does not involve cost sharing or matching but does involve supplement-not-supplant funding provisions. In accordance with section 2313(h)(2) of the ESEA, funds made available under this section shall be used to supplement, and not supplant, State and local public funds expended for teacher recruitment and retention programs, including programs to recruit the teachers through alternative routes to certification.

3. *Other:* The NFP describes eligibility restrictions for individuals participating in this program.

IV. Application and Submission Information

1. Address to Request Application Package

Education Publications Center (ED Pubs), P.O. Box 1398, Jessup, MD 20794–1398. Telephone (toll free): 1–877–433–7827. FAX: (301) 470–1244. If you use a telecommunications device for the deaf (TDD), you may call (toll free): 1–877–576–7734.

You may also contact ED Pubs at its Web site: *http://www.ed.gov/pubs/edpubs.html* or you may contact ED Pubs at its e-mail address: *edpubs@inet.ed.gov.*

If you request an application from ED Pubs, be sure to identify this competition as follows: CFDA number 84.350A, 84.350B, or 84.350C.

Individuals with disabilities may obtain a copy of the application package in an alternative format (*e.g.*, Braille, large print, audiotape, or computer diskette) by contacting the program contact person listed under **FOR FURTHER INFORMATION CONTACT** in section VII of this notice.

2. Content and Form of Application Submission

Requirements concerning the content of an application, together with the forms you must submit, are in the application package for this competition. Additional information concerning application content requirements is in the NFP.

Notice of Intent to Apply: February 21, 2006.

The Department will be able to develop a more efficient process for reviewing grant applications if it has a better understanding of the number of entities that intend to apply for funding under this competition. Therefore, the Secretary strongly encourages each potential applicant to notify the Department by sending a short e-mail message indicating the applicant's intent to submit an application for funding. The e-mail need not include information regarding the content of the proposed application, only the applicant's intent to submit it. The Secretary requests that this e-mail notification be sent to Thelma Leenhouts at: *transitiontoteaching@ed.gov.* Applicants that fail to provide this e-mail notification may still apply for funding.

Page Limit: The application narrative (Part III of the application) is where you, the applicant, address the selection criteria that reviewers use to evaluate your application. Applicants must limit Part III to the equivalent of no more than 50 pages, using the following standards:

- A ''page'' is 8.5″ x 11″, on one side only, with 1″ margins at the top, bottom, and both sides.
- Double space (no more than three lines per vertical inch) all text in the application narrative, except titles, headings, footnotes, quotations, references, and captions, as well as all text in charts, tables, figures and graphs.
- Use a font that is either 12 point or larger or no smaller than 10 pitch (characters per inch).

The page limit does not apply to Part I, the cover sheet; Part II, the budget section, including the narrative budget justification; Part IV, the assurances and certifications; or the one-page abstract, curriculum vitae, or the bibliography of literature cited. However, you must include all of the application narrative in Part III.

Our reviewers will not read any pages of your application that—

- Exceed the page limit if you apply these standards; or
- Exceed the equivalent of the page limit if you apply other standards.

2. Submission Dates and Times

Applications Available: January 27, 2006.

Deadline for Notice of Intent to Apply: February 21, 2006.

Deadline for Transmittal of Applications: March 20, 2006.

Applications for grants under this competition must be submitted electronically using the *Grants.gov* Apply site (*http://www.grants.gov*). For information (including dates and times) about how to submit your application electronically or by mail or hand delivery if you qualify for an exception to the electronic submission requirement, please refer to section IV. 6. *Other Submission Requirements* in this notice.

We do not consider an application that does not comply with the deadline requirements.

Deadline for Intergovernmental Review: May 19, 2006.

4. *Intergovernmental Review:* This competition is subject to Executive Order 12372 and the regulations in 34 CFR part 79. Information about Intergovernmental Review of Federal Programs under Executive Order 12372 is in the application package for this competition.

5. *Funding Restrictions:* We reference regulations outlining funding restrictions in the *Applicable Regulations* section of this notice and in the NFP.

6. *Other Submission Requirements:* Applications for grants under this competition must be submitted electronically unless you qualify for an exception to this requirement in accordance with the instructions in this section.

a. Electronic Submission of Applications

Applications for grants under the Transition to Teaching Competition–CFDA Number 84.350A, 84.350B, and 84.350C must be submitted electronically using the *Grants.gov* Apply site at: *http://www.grants.gov.* Through this site, you will be able to download a copy of the application package, complete it offline, and then upload and submit your application. You may not e-mail an electronic copy of a grant application to us.

We will reject your application if you submit it in paper format unless, as described elsewhere in this section, you qualify for one of the exceptions to the electronic submission requirement and submit, no later than two weeks before the application deadline date, a written statement to the Department that you qualify for one of these exceptions. Further information regarding calculation of the date that is two weeks before the application deadline date is provided later in this section under *Exception to Electronic Submission Requirement.*

You may access the electronic grant application for Transition to Teaching at: *http://www.grants.gov.* You must search for the downloadable application package for this program by the CFDA number. Do not include the CFDA number's alpha suffix in your search.

Please note the following:

- When you enter the *Grants.gov* site, you will find information about submitting an application electronically through the site, as well as the hours of operation.
- Applications received by *Grants.gov* are time and date stamped. Your application must be fully uploaded and submitted, and must be date/time stamped by the *Grants.gov* system no later than 4:30 p.m., Washington, DC time, on the application deadline date. Except as otherwise noted in this section, we will not consider your application if it is date/time stamped by the *Grants.gov* system later than 4:30 p.m., Washington, DC time, on the application deadline date. When we retrieve your application from *Grants.gov,* we will notify you if we are rejecting your application because it was date/time stamped by the *Grants.gov* system after 4:30 p.m., Washington, DC time, on the application deadline date.
- The amount of time it can take to upload an application will vary depending on a variety of factors including the size of the application and the speed of your Internet connection. Therefore, we strongly recommend that you do not wait until the application deadline date to begin the submission process through *Grants.gov.*
- You should review and follow the Education Submission Procedures for submitting an application through *Grants.gov* that are included in the application package for this competition to ensure that you submit your application in a timely manner to the *Grants.gov* system. You can also find the Education Submission Procedures pertaining to *Grants.gov* at *http://e-Grants.ed.gov/help/GrantsgovSubmissionProcedures.pdf*
- To submit your application via *Grants.gov,* you must complete all of the steps in the *Grants.gov* registration process (see *http://www.Grants.gov/GetStarted*). These steps include (1) registering your organization, (2) registering yourself as an Authorized Organization Representative (AOR), and (3) getting authorized as an AOR by your organization. Details on these steps are outlined in the *Grants.gov* 3-Step Registration Guide (see *http://www.grants.gov/assets/GrantsgovCoBrandBrochure8X11.pdf*). You also must provide on your application the same D–U–N–S Number used with this registration. Please note that the registration process may take five or more business days to complete, and you must have completed all registration steps to allow you to successfully submit an application via *Grants.gov.*
- You will not receive additional point value because you submit your application in electronic format, nor will we penalize you if you qualify for an exception to the electronic submission requirement, as described elsewhere in this section, and submit your application in paper format.
- You must submit all documents electronically, including all information typically included on the Application for Federal Education Assistance (ED 424), Budget Information—Non-Construction Programs (ED 524), and all necessary assurances and certifications. You must attach any narrative sections of your application as files in a .DOC (document), .RTF (rich text), or .PDF (Portable Document) format. If you upload a file type other than the three file types specified above or submit a password protected file, we will not review that material.
- Your electronic application must comply with any page limit requirements described in this notice.
- After you electronically submit your application, you will receive an automatic acknowledgment from *Grants.gov* that contains a *Grants.gov* tracking number. The Department will retrieve your application from *Grants.gov* and send you a second confirmation by e-mail that will include a PR/Award number (an ED-specified identifying number unique to your application).
- We may request that you provide us original signatures on forms at a later date.

Application Deadline Date Extension in Case of Technical Issues with the Grants.gov System: If you are prevented from electronically submitting your application on the application deadline date because of technical problems with the *Grants.gov* system, we will grant you an extension until 4:30 p.m., Washington, DC time, the following business day to enable you to transmit your application electronically, or by hand delivery. You also may mail your application by following the mailing instructions as described elsewhere in this notice. If you submit an application after 4:30 p.m., Washington, DC time, on the deadline date, please contact the person listed elsewhere in this notice under **FOR FURTHER INFORMATION CONTACT**, and provide an explanation of the technical problem you experienced with *Grants.gov,* along with the

Grants.gov Support Desk Case Number (if available). We will accept your application if we can confirm that a technical problem occurred with the *Grants.gov* system and that that problem affected your ability to submit your application by 4:30 p.m., Washington, DC time, on the application deadline date. The Department will contact you after a determination is made on whether your application will be accepted.

Note: Extensions referred to in this section apply only to the unavailability of or technical problems with the *Grants.gov* system. We will not grant you an extension if you failed to fully register to submit your application to *Grants.gov* before the deadline date and time or if the technical problem you experienced is unrelated to the *Grants.gov* system.

Exception to Electronic Submission Requirement: You qualify for an exception to the electronic submission requirement, and may submit your application in paper format, if you are unable to submit an application through the *Grants.gov* system because—

- You do not have access to the Internet; or
- You do not have the capacity to upload large documents to the *Grants.gov* system; *and*
- No later than two weeks before the application deadline date (14 calendar days or, if the fourteenth calendar day before the application deadline date falls on a Federal holiday, the next business day following the Federal holiday), you mail or fax a written statement to the Department, explaining which of the two grounds for an exception prevent you from using the Internet to submit your application. If you mail your written statement to the Department, it must be postmarked no later than two weeks before the application deadline date. If you fax your written statement to the Department, we must receive the faxed statement no later than two weeks before the application deadline date.

Address and mail or fax your statement to: Thelma Leenhouts, U.S. Department of Education, 400 Maryland Avenue, SW., room 4W302, Washington, DC 20202–5960. FAX: (202) 401–8466.

Your paper application must be submitted in accordance with the mail or hand delivery instructions described in this notice.

b. Submission of Paper Applications by Mail

If you qualify for an exception to the electronic submission requirement, you may mail (through the U.S. Postal Service or a commercial carrier) your application to the Department. You must mail the original and two copies of your application, on or before the application deadline date, to the Department at the applicable following address:

By mail through the U.S. Postal Service:
U.S. Department of Education, Application Control Center, Attention: 84.350A, 84.350B, or 84.350C, 400 Maryland Avenue, SW., Washington, DC 20202–4260. or

By mail through a commercial carrier:
U.S. Department of Education, Application Control Center—Stop 4260, Attention: 84.350A, 84.350B, or 84.350C, 7100 Old Landover Road, Landover, MD 20785–1506.

Regardless of which address you use, you must show proof of mailing consisting of one of the following:

(1) A legibly dated U.S. Postal Service postmark,

(2) A legible mail receipt with the date of mailing stamped by the U.S. Postal Service,

(3) A dated shipping label, invoice, or receipt from a commercial carrier, or

(4) Any other proof of mailing acceptable to the Secretary of the U.S. Department of Education.

If you mail your application through the U.S. Postal Service, we do not accept either of the following as proof of mailing:

(1) A private metered postmark, or

(2) A mail receipt that is not dated by the U.S. Postal Service.

If your application is postmarked after the application deadline date, we will not consider your application.

Note: The U.S. Postal Service does not uniformly provide a dated postmark. Before relying on this method, you should check with your local post office.

c. Submission of Paper Applications by Hand Delivery.

If you qualify for an exception to the electronic submission requirement, you (or a courier service) may deliver your paper application to the Department by hand. You must deliver the original and two copies of your application by hand, on or before the application deadline date, to the Department at the following address: U.S. Department of Education, Application Control Center, Attention: 84.350A, 84.350B, or 84.350C, 550 12th Street, SW., Room 7041, Potomac Center Plaza, Washington, DC 20202–4260.

The Application Control Center accepts hand deliveries daily between 8 a.m. and 4:30 p.m., Washington, DC time, except Saturdays, Sundays, and Federal holidays.

Note for Mail or Hand Delivery of Paper Applications: If you mail or hand deliver your application to the Department:

(1) You must indicate on the envelope and—if not provided by the Department—in Item 4 of the ED 424 the CFDA number—and suffix letter, if any—of the competition under which you are submitting your application.

(2) The Application Control Center will mail a grant application receipt acknowledgment to you. If you do not receive the grant application receipt acknowledgment within 15 business days from the application deadline date, you should call the U.S. Department of Education Application Control Center at (202) 245–6288.

V. Application Review Information

1. *Selection Criteria:* The selection criteria for this competition are from the statute for this program and § 75.210 of EDGAR and are listed in this section. The maximum score for all the selection criteria is 100 points. The maximum score for each criterion is indicated in parentheses. Each criterion also includes the factors that the reviewers will consider in determining how well an application meets the criterion. In addressing each criterion, applicants are encouraged to make explicit connections to relevant aspects of responses to other selection criteria.

The *Notes* we have included after each criterion are guidance to assist applicants in understanding the criterion as they prepare their applications and are not required by statute or regulation.

A. Significance of the Project (20 Points)

The Secretary considers the significance of the proposed project. In determining the significance of the proposed project, the Secretary considers the following factors:

(1) The significance of the problem or issue to be addressed by the proposed project.

(2) The likelihood that the proposed project will result in system change or improvement.

(3) The extent to which the proposed project involves the development or demonstration of promising new strategies that build on, or are alternatives to, existing strategies.

Note: The Secretary encourages applicants to address this criterion by identifying specific gaps and weaknesses in the services and infrastructure currently in place for the recruitment, preparation, placement, and retention of teachers and by stating how the proposed project will address these gaps and weaknesses. The Secretary encourages applicants to identify (1) current barriers that the high-need LEAs to be served by the project face in meeting their teacher

recruitment needs, including, if relevant, barriers caused by existing State certification or licensure requirements, (2) why these barriers exist, and (3) how the project would significantly help those LEAs overcome these barriers.

Applicants are also encouraged to address this criterion by identifying the specific teacher-shortage areas faced by the participating high-need LEAs on which their proposed projects would focus. These may include such high-need subject areas as mathematics, science, special education, and English as a second language and particular grade levels, including middle and high schools. Applicants should understand that a project's strategy for helping participating high-need LEAs to identify and hire highly qualified individuals to fill teaching positions in high-need subjects may rely on existing alternative routes to certification, expansions of them into new areas, or creation of wholly new alternative routes.

B. Quality of the Project Design (35 Points)

The Secretary considers the quality of the project design for the proposed project by considering how well the applicant describes a plan—

(1) To develop a program to recruit and retain highly qualified mid-career professionals (including highly qualified paraprofessionals) and recent graduates of an IHE as teachers in high-need schools operated by high-need LEAs; and

(2) To enable individuals to become eligible for teacher certification under State-approved alternative routes to certification programs within a reduced period of time, relying on such factors as experience, expertise, and academic qualifications in lieu of traditional course work in education.

In considering the quality of the project design and the applicant's plan, the Secretary considers the following factors:

(a) The extent to which the goals, objectives, and outcomes to be achieved by the proposed project are clearly specified and measurable.

(b) The extent to which the design of the proposed project reflects up-to-date knowledge from research and effective practice.

(c) The extent to which the design of the proposed project is appropriate to, and will successfully address, the needs of the target population or other identified needs.

(d) The extent to which the proposed project is designed to build capacity and yield results that will extend beyond the period of Federal financial assistance.

Note: The Secretary encourages applicants to address this criterion by discussing the overall project model and its key components, and the degree to which the model's key components are based on sound research and practice. Applicants may want to address such key components of project design as:

(1) Recruitment and selection, including identifying the target group(s) on which the program will focus and why and how the program is designed to rigorously select participants with the requisite content knowledge, skills, and commitment to teach in high-need LEAs and schools.

(2) Training and preparation, including how the project provides a route to certification that is accelerated, integrates coursework and field experience, and is adapted to participants' learning needs.

(3) Mentoring and support, including services that are designed to meet the target participants' needs in terms of length, content, and means of delivery in order to be successful in high-needs schools and LEAs.

(4) Teacher placement, including evidence that the proposed project will meet the needs of high-need LEAs and is developed in coordination with appropriate partners, that the timing of placements will be appropriate to the needs of program participants, and that the project includes a system of tracking to meet statutory requirements.

(5) Certification, including consideration of how the timeline for achieving full certification will meet the needs of participants, LEAs, and partners, as well as the ''Highly Qualified Teacher'' requirements established in section 9101(23) of the ESEA.

In addition, applicants are encouraged to clarify the means by which the project's specified outcomes and benefits may be sustained once Federal funding has ended.

C. Quality of Project Services (20 Points)

In determining the quality of the services to be provided by the proposed project, the Secretary considers the following factors:

(1) The extent to which the services to be provided by the proposed project are appropriate to the needs of the intended recipients or beneficiaries of those services.

(2) The extent to which the training or professional development services to be provided by the proposed project are of sufficient quality, intensity, and duration to lead to improvements in practice among the recipients of those services.

(3) The extent to which the training or professional development services to be provided by the proposed project are likely to alleviate the personnel shortages that have been identified or are the focus of the proposed project.

(4) The extent to which the services to be provided by the proposed project involve the collaboration of appropriate partners for maximizing the effectiveness of project services.

Note: The Secretary encourages applicants to address this criterion by discussing how the proposed project services will meet the needs both of the high-need LEAs identified in the application and of the program participants they would recruit to become teachers. Applicants are encouraged to consult the list of authorized activities in section 2313(g) of the ESEA in describing the specific services to be delivered to recruit, prepare, and retain participants that will increase the number of highly qualified teachers in high-need schools in high-need LEAs. In addition, the Secretary encourages applicants to consider carefully the breadth of activities that section 2313(g) of the ESEA authorizes and then to address how the project will:

(1) Provide training that meets the learning needs of the participants and makes use of appropriate media (such as face-to-face and Web-based instruction, and distance learning) to provide them with the skills needed to be highly qualified and effective teachers in the identified high-need subject areas and high-needs schools and LEAs.

(2) Support project participants' success in high-need schools and LEAs during the period of their service obligation through individual mentoring, support of participants as a group, use of technology, or other appropriate means.

(3) Encourage the participation of all project partners, including school leaders, in providing services related to the recruitment, preparation, and retention of project participants and ensuring lasting benefits or outcomes. Applicants are encouraged to clarify the roles of partners in each phase of the project and the extent of coordination that will occur with similar efforts at the State and district levels. In addition, applicants are encouraged to consider how they might demonstrate (*e.g.*, through narrative discussion, letters of support, or formal memoranda of understanding) the commitment of partners to the project and the partners' understanding of responsibilities they have agreed to assume in service delivery.

D. Quality of the Management Plan (10 Points)

In determining the quality of the management plan for the proposed project, the Secretary considers the adequacy of the management plan to achieve the objectives of the proposed project on time and within budget, including clearly defined responsibilities, timelines, and milestones for accomplishing project tasks.

Note: Section 75.112 of EDGAR requires an applicant for a multiyear grant to include a narrative that describes how and when, in each budget period of the project, the applicant plans to meet each project objective. The Secretary encourages applicants to address this criterion by including in this narrative a schedule of activities with sufficient time for developing an adequate implementation plan, as well as timelines for providing program participants the support they need in their initial years as teachers.

E. Quality of the Project Evaluation (15 Points)

The Secretary considers the quality of the evaluation to be conducted of the proposed project. In determining the quality of the evaluation to be conducted, the Secretary considers the following factors:

(1) The extent to which the methods of evaluation include the use of objective performance measures that are clearly related to the intended outcomes of the project and will produce quantitative and qualitative data to the extent possible.

(2) The extent to which the methods of evaluation will provide performance feedback and permit periodic assessment of progress toward achieving intended outcomes.

Note: The Secretary encourages applicants to address this criterion by including benchmarks to monitor progress toward specific project objectives and also outcome measures to assess the impact on teaching and learning or other important outcomes for project participants. (The specific performance measures established for the overall Transition to Teaching program are discussed under *Performance Measures* in section VI of this notice. Section 2314 of the ESEA also requires grantees to submit both an interim evaluation of the first three years of the grant and a final evaluation at the end of the grant.)

The Secretary also encourages applicants to identify the individual or organization that has agreed to serve as evaluator for the project and describe the qualifications of that evaluator. Finally, applicants are encouraged to indicate: (1) What types of data will be collected; (2) when various types of data will be collected; (3) what methods will be used; (4) what instruments will be developed and when; (5) how the data will be analyzed; (6) when reports of results and outcomes will be available; and (7) how the applicant will use the information collected through the evaluation to monitor progress of the funded project and to provide accountability information about both the success at the initial site or sites and effective strategies for replication in other settings. Applicants are encouraged to devote an appropriate level of resources to project evaluation.

2. *Review and Selection Process:* Additional information concerning our review and selection of grant applications in this competition are contained in the NFP.

VI. Award Administration Information

1. *Award Notices:* If your application is successful, we notify your U.S. Representative and U.S. Senators and send you a Grant Award Notification (GAN). We may also notify you informally.

If your application is not evaluated or not selected for funding, we notify you.

2. *Administrative and National Policy Requirements:* We identify administrative and national policy requirements in the application package and reference these and other requirements in the Applicable Regulations section of this notice.

We reference the regulations outlining the terms and conditions of an award in the *Applicable Regulations* section of this notice and include these and other specific conditions in the GAN. The GAN also incorporates your approved application as part of your binding commitments under the grant.

3. *Reporting:* The Secretary requires successful applicants to submit annual performance reports and, after the last year of the project, a final report. The annual performance report documents the grantee's yearly progress toward meeting expected programmatic outcomes. These outcomes must be based on measurable performance objectives including, but not limited to, the performance measures described in paragraph 4 of this section. These reports must evaluate—

(1) The grantee's progress in meeting the application's objectives;

(2) The project's effectiveness in meeting the purposes of the Transition to Teaching program; and

(3) The project's effect on the specific LEAs the project serves.

Among other things, the Department uses the annual performance reports to determine whether a grantee has demonstrated substantial progress in meeting the goals and objectives (as described in its approved application), and thereby merits a continuation award (for years 2–5). See § 75.118 of EDGAR.

Grantees also will be required to submit a final performance report, due no later than 90 days after the end of the project period.

In addition, section 2314 of the ESEA requires grantees to submit to the Department and to the Congress interim and final evaluations at the end of the third and fifth years of the grant period, respectively. These evaluations must describe the extent to which high-need LEAs that received funds through the grant have met their goals relating to teacher recruitment and retention as described in the project application. Additional requirements pertaining to these reports are in the NFP.

For specific requirements on grantee reporting, please go to *http://www/ed/gov/fund/grant/apply/appforms.html.*

4. *Performance Measures:* The Secretary has established one performance indicator for assessing the effectiveness of the Transition to Teaching program: the percentage of new, highly qualified Transition to Teaching teachers who teach in high-need schools in high-need LEAs for at least three years. We will track this indicator through the use of the following three performance measures. We will gather the data for these measures from the grantees.

Measure One: The percentage of all Transition to Teaching participants who become teachers of record in high-need schools in high-need LEAs.

Measure Two: The percentage of Transition to Teaching participants receiving certification/licensure within three years.

Measure Three: The percentage of Transition to Teaching teachers of record who teach in high-need schools in high-need LEAs for at least three years.

VII. Agency Contacts

For Further Information Contact: Thelma Leenhouts, Gillian Cohen-Boyer, Beatriz Ceja, or Anthony Sepulveda, U.S. Department of Education, 400 Maryland Avenue, SW., room 4W318, Washington, DC 20202. Telephone: (202) 260–0223 (Thelma Leenhouts); (202) 401–2159 (Gillian Cohen-Boyer); (202) 260–3548 (202) 205–5009 (Beatriz Ceja); or (202) 260–0464 (Anthony Sepulveda). By e-mail: *transitiontoteaching@ed.gov*.

If you use a telecommunications device for the deaf (TDD), you may call the Federal Relay Service (FRS) at 1–800–877–8339.

Individuals with disabilities may obtain this document in an alternative format (*e.g.*, Braille, large print, audiotape, or computer diskette) on request to the program contact persons listed in this section.

VIII. Other Information

Electronic Access to This Document: You may view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Adobe Portable Document Format (PDF) on the Internet at the following site: *http://www.ed.gov/news/fedregister.*

To use PDF you must have Adobe Acrobat Reader, which is available free at this site. If you have questions about using PDF, call the U.S. Government Printing Office (GPO), toll free, at 1–888–293–6498; or in the Washington, DC, area at (202) 512–1530.

Note: The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available on GPO Access at: *http://www.gpoaccess.gov/nara/index.html.*

Dated: January 20, 2006.

Christopher J. Doherty,

Acting Assistant Deputy Secretary for Innovation and Improvement.

[FR Doc. 06–763 Filed 1–25–06; 8:45 am]

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Federal Register

Vol. 71, No. 17

Thursday, January 26, 2006

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General Information, indexes and other finding aids	**202–741–6000**
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Other Services	
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Privacy Act Compilation	**741–6064**
Public Laws Update Service (numbers, dates, etc.)	**741–6043**
TTY for the deaf-and-hard-of-hearing	**741–6086**

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FEDERAL REGISTER PAGES AND DATE, JANUARY

1–230	3
231–536	4
537–872	5
873–1388	6
1389–1472	9
1473–1682	10
1683–1914	11
1915–2134	12
2135–2452	13
2453–2856	17
2857–2990	18
2991–3204	19
3205–3408	20
3409–3752	23
3753–4032	24
4033–4230	25
4231–4450	26

CFR PARTS AFFECTED DURING JANUARY

At the end of each month, the Office of the Federal Register publishes separately a List of CFR Sections Affected (LSA), which lists parts and sections affected by documents published since the revision date of each title.

3 CFR

Proclamations:
6867 (See: Notice of January 10, 2006) 2133
7757 (See: Notice of January 10, 2006) 2133
7973 3199
7974 3201
7975 4229

Executive Orders:
12947 (See Notice of January 18, 2006) 3407
13099 (See Notice of January 18, 2006) 3407
13395 3203

Administrative Orders:
Memorandums:
Memorandum of December 15, 2005 1467
Presidential Determinations:
No. 2006–6 of December 22, 2005 1469
No. 2006–7 of December 30, 2005 871
No. 2006–8 of December 30, 2005 1471
Notices:
Notice of January 6, 2006 1681
Notice of January 10, 2006 2133
Notice of January 18, 2006 3407

5 CFR

337 3409
1650 1389

Proposed Rules:
724 4053
1651 1984

7 CFR

226 1
400 2135
930 1915
946 1919
982 1921
1427 4231
1740 3205

Proposed Rules:
56 ..... 2168, 4056
57 4056
70 2168
319 1700
457 4056
1000 545
1001 545
1005 545
1006 545
1007 545
1030 545
1032 545
1033 ..... 545, 3435
1124 545
1126 545
1131 545
1493 3790
1496 3442

9 CFR

78 2991
317 1683
381 1683
391 2135
590 2135
592 2135

Proposed Rules:
77 1985
318 2483
381 2483
392 1988
439 2483

10 CFR

35 1926

Proposed Rules:
20 29
30 ..... 29, 275
31 ..... 29, 275
32 ..... 29, 275
33 29
35 29
50 4061
73 3791
150 275

12 CFR

205 ..... 1473, 1638
701 4234
741 ..... 4033, 4234
742 4035

Proposed Rules:
Ch. I 287
Ch. II 287
Ch. III 287
Ch. V 287
611 1704

13 CFR

Proposed Rules:
120 4062

14 CFR

11 1483
21 534
23 ..... 537, 1926, 2143
25 ..... 1485, 3753
36 530
39 ..... 231, 873, 1390, 1930,

REMINDERS

The items in this list were editorially compiled as an aid to Federal Register users. Inclusion or exclusion from this list has no legal significance.

RULES GOING INTO EFFECT JANUARY 26, 2006

AGRICULTURE DEPARTMENT

Agricultural Marketing Service

Pears (winter) grown in—

Oregon and Washington; published 12-27-05

AGRICULTURE DEPARTMENT

Commodity Credit Corporation

Loan and purchase programs:

Cottonseed Payment Program; published 1-26-06

AGRICULTURE DEPARTMENT

Forest Service

Alaska National Interest Lands Conservation Act:

Fish and wildlife; subsistence taking; published 12-27-05

COMMERCE DEPARTMENT

National Oceanic and Atmospheric Administration

Fishery conservation and management:

Northeastern United States fisheries—

Northeast multispecies; correction; published 12-27-05

ENERGY DEPARTMENT

Federal Energy Regulatory Commission

Electric utilities (Federal Power Act):

Energy market manipulation; prohibition; published 1-26-06

FEDERAL COMMUNICATIONS COMMISSION

Television broadcasting:

Cable television systems—

Satellite Home Viewer Extension and Reauthorization Act of 2004; Communications Act Section 340; implementation; published 12-27-05

INTERIOR DEPARTMENT

Fish and Wildlife Service

Alaska National Interest Lands Conservation Act:

Fish and wildlife; subsistence taking; published 12-27-05

TRANSPORTATION DEPARTMENT

Transportation Acquisition Regulation (TAR); revision; published 12-27-05

TRANSPORTATION DEPARTMENT

Federal Aviation Administration

Airworthiness directives:

General Electric Co.; published 12-22-05

Standard instrument approach procedures; published 1-26-06

COMMENTS DUE NEXT WEEK

AGRICULTURE DEPARTMENT

Agricultural Marketing Service

Soybean promotion and research order; comments due by 1-31-06; published 12-2-05 [FR E5-06786]

Spearmint oil produced in—

Far West; comments due by 2-3-06; published 12-5-05 [FR 05-23620]

AGRICULTURE DEPARTMENT

Federal Crop Insurance Corporation

Crop insurance regulations:

Basic provisions; written agreements and use of similar agricultural commodities; comments due by 1-30-06; published 11-30-05 [FR 05-23509]

AGRICULTURE DEPARTMENT

Forest Service

National Forest System land and resource management planning:

2005 planning rule; amendments; comments due by 2-3-06; published 1-4-06 [FR E5-08245]

BLIND OR SEVERELY DISABLED, COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE

Javits-Wagner-O'Day (JWOD) Program:

Nonprofit agencies and central nonprofit agencies; governance standards; comments due by 1-31-06; published 12-16-05 [FR E5-07439]

CHEMICAL SAFETY AND HAZARD INVESTIGATION BOARD

Accident investigation initiation notice and order to preserve evidence; comments due by 2-3-06; published 1-4-06 [FR E5-08239]

COMMERCE DEPARTMENT

National Oceanic and Atmospheric Administration

Fishery conservation and management:

West Coast States and Western Pacific fisheries—

Coastal pelagic species; comments due by 2-1-06; published 1-17-06 [FR E6-00419]

ENERGY DEPARTMENT

Federal Energy Regulatory Commission

Electric utilities (Federal Power Act) and natural gas companies (Natural Gas Act):

Jurisdictional agreements modifications; review standard; comments due by 2-3-06; published 1-4-06 [FR E5-08217]

ENVIRONMENTAL PROTECTION AGENCY

Air programs:

Fuel and fuel additives—

Renewable Fuel Program; 2006 default standard; comments due by 1-30-06; published 12-30-05 [FR 05-24611]

Renewable Fuel Program; 2006 default standard; comments due by 1-30-06; published 12-30-05 [FR 05-24610]

Air quality implementation plans:

Ambient air quality standards, national—

Fine particles; comments due by 1-31-06; published 11-1-05 [FR 05-20455]

Fine particles; hearing; comments due by 1-31-06; published 11-15-05 [FR 05-22694]

Air quality implementation plans; approval and promulgation; various States:

Michigan; comments due by 1-30-06; published 12-29-05 [FR E5-08036]

Montana; comments due by 2-2-06; published 1-3-06 [FR 05-24365]

Tennessee; comments due by 2-2-06; published 1-3-06 [FR 05-24412]

Pesticides; tolerances in food, animal feeds, and raw agricultural commodities:

Hexythiazox; comments due by 1-30-06; published 12-30-05 [FR E5-08037]

HEALTH AND HUMAN SERVICES DEPARTMENT

Quarantine, inspection, and licensing:

Communicable diseases control; comments due by 1-30-06; published 11-30-05 [FR 05-23312]

HOMELAND SECURITY DEPARTMENT

Coast Guard

Drawbridge operations:

Washington; comments due by 2-3-06; published 12-5-05 [FR 05-23637]

Pollution:

Pollution prevention equipment; oil discharge reduction from vessels, and elimination of ozone-depleting solvents in equipment tests; comments due by 2-1-06; published 11-3-05 [FR 05-21573]

INTERIOR DEPARTMENT

Fish and Wildlife Service

Endangered and threatened species:

Critical habitat designations—

California red-legged frog; comments due by 2-1-06; published 11-3-05 [FR 05-21594]

INTERIOR DEPARTMENT

Minerals Management Service

Royalty management:

Federal leases on takes or entitlements basis; reporting and paying royalties; meeting; comments due by 1-30-06; published 11-29-05 [FR 05-23380]

LABOR DEPARTMENT

Occupational Safety and Health Administration

Construction and occupational safety and health standards:

Roll-over protective structures; comments due by 1-30-06; published 12-29-05 [FR 05-24462]

SOCIAL SECURITY ADMINISTRATION

Social security benefits:

Disability benefits; suspension during continuing disability reviews; comments due by 2-3-06; published 12-5-05 [FR 05-23615]

Fugitive felons and probation or parole violators; nonpayment of benefits; comments due by 2-3-06; published 12-5-05 [FR 05-23618]

LIST OF PUBLIC LAWS

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H.R. 4340/P.L. 109–169

United States-Bahrain Free Trade Agreement Implementation Act (Jan. 11, 2006; 119 Stat. 3581)

Last List January 12, 2006

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